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OCTOBER TERM, 1971

No. 71-731

FRED THOMAS, SHERIFF, D. C. YEARWOOD, DEPUTY SHERIFF, and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioners,

vs.

E. E. MORGAN,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-1152

E. E. MORGAN,
Petitioner-Appellant,

versus

FRED THOMAS, SHERIFF OF HINDS COUNTY, MISS, ETC.,
Respondent-Appellee,

UNITED STATES FIDELITY & GUARANTY COMPANY,
Intervenor.

Appeal from the United States District Court for the Southern District of Mississippi

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(September 17, 1971)

Before BROWN, Chief Judge, GEWIN and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: This is an appeal from a judgment denying a petition for a writ of habeas corpus by which the appellant Morgan seeks to challenge collaterally

a decree adjudging him to be in civil contempt for failing to comply with a decree of the Chancery Court of Hinds County, Mississippi, and directing that he be fined and imprisoned until he purge himself of contempt. The decree with which he refuses to comply resulted out of a proceeding in the nature of a judgment creditor's bill and directed Morgan, among other things, to file with the court and United States Fidelity & Guaranty Company (hereafter, U.S.F.&G.), an intervenor herein, a financial statement in regular form giving his financial position on two dates specified in the decree and a statement under oath setting forth the identity, status, and location of assets of every kind, including the names of persons having possession, custody or control of the assets. Morgan contends that in order to provide this information he will be required to incriminate himself in violation of the Fifth and Fourteenth Amendments to the United States Constitution under §§ 2250 and 2252 of the Mississippi Code of 1942, Recompiled, which prohibit as larceny the removal or concealment of assets subject to a judgment lien and, further, that such information might subject him to punishment for criminal contempt for having failed to convey all his assets to a receiver as directed by the chancellor's decree. We reverse and remand with directions more fully set out below.

In 1958, Morgan entered an arrangement with R. W. Hyde, Jr., doing business as the Hyde Construction Company, for the purpose of lending his considerable assets to Hyde's growing construction business to enable Hyde to secure payment and performance bonds from various surety companies. Under this arrangement, Morgan would execute an indemnity agreement with the surety company supplying the necessary bonds for a construction project and then, in return, would receive a commission from

Hyde, which under the terms of their agreement was two and one-half percent of the contract price of the project. As a result it became possible for Hyde to obtain large construction contracts that would have otherwise been beyond his financial reach.

In that same year, U.S.F.&G. began writing bonds for Morgan and Hyde, and Morgan furnished it his financial statements for the years 1956, 1957 and 1958, each of which showed that he had a personal net worth in excess of three million dollars.

In January, 1960, the R. V. Tyler Company, Inc., and Hyde Construction Company executed an application for a performance and payment bond and an indemnity agreement with U.S.F.&G. in connection with a contract entered into between Hyde Construction Company and the City of Shively, Kentucky, for the construction of a large sewer system. Morgan obligated himself under the bond application and indemnity agreement by letter in which he stated:

> That the signing and furnishing of this letter obligates me to the terms and conditions of the enclosed 'Application for Performance and Payment Bonds and Indemnity Agreement' on Form No. 1 just as though I were named as one of the applicants therein and my signature were duly affixed thereto.

Under the terms of the application, the applicants, including Morgan, agreed that:

> * * * applicants and any of them will furnish to sureties upon request and at such reasonable intervals of time as sureties may designate, financial statements

showing the current financial position of the applicant of whom such request or statement is made.[1]

As time progressed, Hyde became financially unable to meet his obligations and U.S.F.&G. became liable to third parties on several bonds covering his contracts, including the bond covering the Shively sewer project. After discharging these liabilities, U.S.F.&G. filed an action in Mississippi chancery court to recover indemnity from Morgan, Hyde and their affiliates. In its decree the chancery court held that Morgan and the other defendants were obligated "to perform specifically each and every obligation assumed by them under the terms of each of the various bond applications and indemnity agreements signed by them" and awarded U.S.F.&G. a money judgment for approximately $3,000,000. In doing so, the chancellor found that U.S.F.&G. acted in reliance on the combined net worth and assets of Morgan and Hyde and was thereby induced to write surety bonds on numerous construction projects involving many millions of dollars, and that, in each of the twelve bonds on which indemnity was being sought, Morgan voluntarily and specifically bound

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1. The paragraph of the Shively bond application here in question provides that:

> Tenth: A representative of the sureties shall have access at all reasonable times and places to the books and records of the said applicants and to correspondence with the representatives of said Obligee and shall be entitled to receive full information from the applicants and the banks of deposit of said applicants and shall be given such information as such representatives shall request, all as the same relate to the construction work to be performed by the applicants in connection with the contracts hereinabove mentioned . . . In addition to the above information to be furnished from, and the right given to the Sureties to examine, the books, records, correspondence and bank accounts of applicants as the same relate to said above mentioned contract, applicants and any of them will furnish to Sureties, upon request and at such reasonable intervals of time as Sureties may designate, financial statements showing the current financial position of the applicant of whom such request for a statement is made.

himself to protect, reimburse, indemnify and exonerate U.S.F.&G. in funds with which to pay creditors of the projects. The decree was affirmed on appeal, *Morgan* v. *United States Fidelity & Guaranty Co.*, 191 So. 2d 917 (Miss. 1966), and was enrolled and became a judgment lien upon all the assets and properties of the judgment debtors.

On September 3, 1965, U.S.F.&G. made a formal demand and request that Morgan furnish it with a financial statement showing his current financial position. Morgan refused the request and, in November, 1965, was adjudged in civil contempt for his refusal to furnish the requested financial statement by the chancery court. However, on appeal the Mississippi Supreme Court held that the 1965 decree was not sufficiently specific to support the civil contempt decree. *Morgan* v. *United States Fidelity & Guaranty Co.*, 191 So. 2d 851 (1966).

Thus in 1967, after failing to obtain a financial statement and after failing to collect its judgment by means of writ of execution and garnishment, U.S.F.&G. filed an action in the nature of a judgment creditor's bill in chancery court seeking to enforce the 1965 decree; to enforce specific performance of Morgan's agreement to furnish current financial statements; to obtain discovery of Morgan's assets; and to obtain other equitable relief, including the appointment of a receiver. In its bill, U.S.F.&G. averred that:

> * * * Said judgment has been duly enrolled and constitutes a lien on the property of defendant. * * * Complainant avers upon information and belief that defendant has concealed his assets and resorted to other devices for the purpose of hindering, delaying and defrauding complainant of its rights as a judg-

ment creditor, and complainant has no plain, adequate, speedy and complete remedy at law.

Morgan refused to respond to this averment on the ground that to do so might tend to incriminate him under §§ 2250 and 2252 of the Code of Mississippi of 1942, Recompiled.[2]

While the chancellor refused to require Morgan to answer the averment made by U.S.F.&G. that he had fraudulently concealed assets on the ground that to do so would violate his privilege against self-incrimination under the Fifth Amendment, he held, after a trial on the merits, that a course of conduct was shown indicating concealment of assets by Morgan when regard was had to Morgan's failure to testify; that the complainant U.S.F.&G. was entitled to a full discovery of the identity, status and location of assets of every kind, including the names of persons having possession, custody or control of assets; that a receiver should be appointed for the collection of Morgan's

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2. §2250. *Larceny—removing property subject to lien out of state.*

If any person shall move, or cause to be removed, to any place beyond the jurisdiction of this state, any personal property which shall at the time of such removal be under written pledge, or mortgage, or deed of trust, or conditional sales contract, or lien by judgment, or any other lien in this state, with intent to defraud the pledgee, mortgagee, trustee, cestui que trust, conditional vendor, or creditor, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined not more than one thousand dollars ($1,000.00) or imprisoned in the county jail not more than twelve (12) months, or both.

§2252. *Larceny—removing property subject to lien out of the county—selling.*

Any person who shall remove, or cause to be removed, or aid or assist in removing from the county in which it may be, any personal property which may be the subject of a pledge, mortgage, deed of trust, conditional sales contract, lien of a lessor of lands, or lien by judgment, or any other lien of which such party has notice, without the consent of the holder of such encumbrance or lien, or who shall conceal or secrete such property, or who shall sell or dispose of the same or any part thereof without the consent of the mortgagee or beneficiary,

assets;[3] and that Morgan should be enjoined from disposing of any assets which might be owned by him. Pursuant to these holdings, the chancellor decreed that:

> 6. The complainant is entitled to specific performance of the application and indemnity agreement relating to the Shively, Kentucky project * * * and it is ordered, adjudged and decreed that the defendant, E. E. Morgan, is ordered, directed and commanded to furnish the complainant, within fifteen (15) days from the date of this decree, and to file with the Clerk of this Court in this cause, a financial statement showing the current financial position of defendant as of the date of September 3, 1965, and as of the date of the decree. Said financial statement shall be in the form and shall show in detail the information called for by the form attached hereto * * *.
>
> 7. That the defendant, E. E. Morgan, be and he is hereby ordered, directed and commanded to file with the complainant and with the Clerk of this Court, within fifteen (15) days from the date of this decree, a statement in writing setting forth the identity, status and location of all his assets and property of every kind, nature and description, and setting forth the name or names of any persons, firms or corporations who may have custody or control of any of said assets or property, such statement to include, but not to be limited to, all goods, chattels, money, accounts,

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or conditional vendor, whether any of these acts shall be done before or after the maturity of the debt secured by the lien, and shall not immediately discharge such encumbrance or lien or pay to the holder of such lien or encumbrance the value of such property in event same is less than the amount of such lien or encumbrance, shall, upon conviction, be imprisoned in the county jail not more than one year, or be fined not exceeding the value of such property, or both.

3. Pursuant to this decree, Morgan conveyed certain of his assets to the receiver on August 21, 1967, by quitclaim deed.

notes, bonds, mortgages, deeds of trust, contracts, securities, evidences of debt and choses in action, belonging to defendant or wherein he has any interest.

In his exception to the final decree, Morgan specifically excepted to Paragraphs 6 and 7 on the ground that they required him to incriminate himself in violation of the Fifth and Fourteenth Amendments. The chancellor denied Morgan's exceptions on August 9, 1967, and he appealed to the Supreme Court of Mississippi.

In affirming the chancellor's decree in *Morgan v. United States Fidelity & Guaranty Co.*, 222 So. 2d 820 (Miss. 1969), cert. den. 396 U.S. 842, the Mississippi Supreme Court held that Morgan had waived his privilege against self-incrimination either by contract or estoppel, relying particularly on Wigmore on Evidence, § 2275 (McNaughton Rev. 1961) to the effect that:

> * * * (1) A bare contract to waive the privilege will not be enforced *specifically*. Rather, it will be enforced, where possible, by indirect sanctions similar to those (short of arrest and contempt) available to punish civil litigants who refuse to comply with orders to make discovery—e.g. dismissal of the action. Or the sanction may be loss of employment or of pension or of the right to do business with the government.
>
> (2) Where there are not only the ingredients of an express or implied contract to waive but also a *fiduciary relation* or other elements of public policy making recognition of privilege unconscionable, the waiver of privilege may be specifically enforced and the witness held in contempt for failure to make disclosure. * * * (Footnotes omitted.)

The court also relied on the cases of *Shepard* v. *Barron*, 194 U.S. 553, 24 S.Ct. 737, 48 L.Ed. 1115 (1904) and *Zap* v. *United States*, 328 U.S. 624, 66 S.Ct. 1277, 90 L.Ed. 1477 (1946). After finding a different application for the privilege in civil, rather than criminal, proceedings, the court held that the bonds gave rise to the equivalent of a fiduciary relationship, that of a principal and surety and that since Morgan stood in relation to U.S.F.&G. as a principal obligated to protect his surety, U.S.F.&G. was entitled to have specific performance on the undertaking in the application for the Shively bond whereby Morgan promised to supply U.S.F.&G. his financial statement upon reasonable demand. The court found public policy support for this conclusion in the need for the orderly enforcement of judicial process. On this basis, the court found it unnecessary to discuss whether or not the technical requirements of waiver or estoppel were complied with, although it quoted at length from *Shepard* v. *Barron*, supra.

The challenged portions of the decree were stayed until the petition for certiorari was denied by the U.S. Supreme Court. Morgan still refused to provide the specific information and on March 9, 1970, the chancery court entered a decree adjudging him to be in civil contempt and ordered that he be taken into custody and confined until he purged himself of contempt. The decree also imposed a civil fine of $50 for each day Morgan refused to comply.

Morgan was arrested by the sheriff of Hinds County, Mississippi, on March 9, 1970, but was freed immediately thereafter on order of the district court pending a determination on the merits of a petition for a writ of habeas corpus filed with the federal district court. After a full hearing, the district court denied the petition holding

that in view of the fact that Morgan had voluntarily agreed to provide U.S.F.&G. with financial statements upon reasonable demand and other financial information in the application for the bond on the Shively sewer project and that U.S.F.&G. was induced to write the bond on the Shively project in reliance on the promises made in that application

> * * * this Court is of the opinion and find that petitioner's constitutional privilege against self-incrimination afforded by the Fifth and Fourteenth Amendments was relinquished by his conduct which constituted a specific, deliberate and voluntary waiver and that he is, under the facts and circumstances hereof, estopped from claiming this privilege.

The district court further stated:

> In any event, if the Court is mistaken in this regard, it is perfectly clear that the financial statement must be furnished, and that petitioner's refusal to furnish it herein justifies his adjudication of civil contempt.

Subsequently, on March 1, 1971, the Mississippi Supreme Court affirmed the civil contempt decree in all respects. *Morgan v. United States Fidelity & Guaranty Co.*, 245 So. 2d 587 (Miss. 1971).

We are thus presented in this appeal with two narrow issues: *first*, whether the privilege against self-incrimination can be relinquished by contract prior to the development of circumstances which would make its exercise appropriate; and, *secondly*, whether the privilege can be lost under the traditional doctrine of equitable es-

toppel under the facts presented here.[4] As will be developed in more detail below, we do not feel that Morgan relinquished his privilege either by express contract or by conduct giving rise to an estoppel in pais and was therefore entitled to assert it before the Mississippi chancery court.

I. *Relinquishment by Contract.*

As was noted above, the Mississippi Supreme Court was strongly impressed with Section 2275 of Wigmore on Evidence, supra, in holding that because Morgan had expressly contracted to provide certain financial information to U.S.F.&G. in the Shively bond application, stood in the fiduciary relation of principal to his surety, U.S.F.&G. and because of the public interest in effectuating judicial process against judgment debtors, U.S.F.&G. was entitled to have the agreement to provide a financial statement specifically enforced, notwithstanding the assertion of the privilege by Morgan.

This statement in Wigmore, in turn, relied exclusively for federal authority upon the case of *United States* v. *Field,* 2 Cir., 1951, 193 F. 2d 92, cert. dism. 342 U.S. 908. In that case, the trustee of a bond fund for the defendants in the famous communist conspiracy cases of the late 1940's and early 1950's refused to divulge the sources of the fund's money, produce the books and records of the fund and to testify as to the whereabouts of four of the defendants who had jumped bail and fled. The trustee

4. It is conceded by all parties that the privilege can be asserted in a civil proceedings of the nature involved herein and that, absent any relinquishment by Morgan, he is entitled to assert it in refusing to file the statements required by the chancery court's decree. See generally, *Hoffman* v. *United States,* 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951), and *McCarthy* v. *Arndstein,* 226 U.S. 34, 45 S.Ct. 16, 69 L.Ed. 158 (1924).

was held in civil contempt for these refusals and the court of appeals, in the course of its opinion upholding the contempt conviction, over a strong dissent by Judge Frank, held that when a person undertakes a direct obligation as a public officer or fiduciary to provide certain information—such as a bail bond surety's obligation to act as jailor for his principal and answer for their presence to the court—he cannot avoid his obligation by asserting the privilege.[5]

Two later cases, however, made it clear that *Field* no longer states the law. In *Curcio* v. *United States*, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed. 2d 1225 (1957), the secretary-treasurer of a local union asserted his privilege against self-incrimination in refusing to answer questions concerning the whereabouts of the local's books and records. The Court held that "[a] custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visatorial powers. But he cannot lawfully be compelled, in the absence of a grant

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5. In dissenting, Judge Frank said:

> My colleagues' position as to those questions is this: The defendants bargained away the privilege many months before any judicial inquiry arose, when they voluntarily became sureties and thereby impliedly promised to disclose to the government any information which might aid in bringing into custody the convicted persons for whom the defendants had gone bail. I have no doubt that the defendants did assume that obligation. Doubtless, too, the effective assertion of the privilege would be flatly inconsistent with that obligation and would be a breach of it. But I do not accept my colleagues' thesis that a court may criminally punish a man who breaks such a contract by which he agrees, long in advance, to surrender his anti-self-incrimination privilege. In short, I think that no such advance (pre-inquiry) contract can validly destroy the privilege (not to give oral self-incriminating testimony) when asserted by a witness in response to, questions during a proceeding, if that privilege would otherwise apply.

At 193 F. 2d 103, 104.

of adequate immunity from prosecution, to condemn himself by his own oral testimony". Id. at 123-124. In doing so, the Court went on to say:

> The Government cites but one federal case, United States v. Field (CA2d NY) 193 F.2d 92, as directly supporting its position. [Footnote omitted.] In that case, the trustees of a bail fund were held in contempt for failure to produce records of the fund pursuant to a subpoena. After affirming the convictions on that ground, the Court of Appeals for the Second Circuit went on to consider, by way of dictum, other contentions raised by the trustees. One of their contentions was that questions about the location and production of records were improper. The court, relying on several cases in which a custodian was compelled to identify records which he had already produced, said that the questions pertaining to the location of the records "were proper under the precedents". Id. 193 F. 2d at 97. The cases cited, however, do not support the court's dictum.[6] Id. at 126-127.

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6. Moreover, prior and subsequent decisions of the same court, in which two of the same judges participated, contradict the statement contained in the Field case. In United States v. Daisart Sportswear, Inc. (CA 2d NY) 169 F. 2d 856, 861, 862, the court stated that "we do not believe that the principle of the Austin-Bagley case, supra, may be projected so that a corporate officer may be compelled to testify as to any and all phases of the corporation's activities, without at the same time obtaining a grant of immunity for the incriminating matter he is compelled to disclose". And further, that "the production of records must be distinguished from oral testimony as to what the records would contain, had they been produced".

Id. 169 F. 2d at 862. Subsequently, in United States v. Patterson (CA 2d NY) 219 F. 2d 659, 662, the court, in reversing a contempt conviction for refusal to produce records, approved the trial court's ruling that questions relating to the whereabouts of the records were privileged. "The defendant can here legally be jailed only for a contempt in failing to produce the sought-after books when they are fairly shown to be presently within his power and control. He cannot legally be jailed for contempt for invoking his constitutionally protected privilege not to be a witness against himself."

See also, Lopiparo v. United States (CA 8th Mo) 216 F. 2d 87, where the trial court upheld the custodian's claim of privilege with respect to oral testimony pertaining to corporate records.

More recently, the Supreme Court has held in *Gardner* v. *Broderick*, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed. 2d 1082 (1968), that a police officer could not be dismissed from his employment for the sole reason of asserting his privilege against self-incrimination and refusing to waive his statutory immunity from prosecution in a grand jury investigation, even though he was required to do so by statute and the terms of his employment contract. In view of this holding, it is difficult to understand how a person can be punished by the sanction of contempt for asserting the privilege in contravention to a prior contractual undertaking in no way contemplating circumstances which might make the assertion of the privilege appropriate.

Moreover, such a position would lead to a situation which would make the privilege unavailable in commer-

cial transactions at the whim of one of the contracting parties. As was said by Judge Frank in his dissent in the *Field* case:

> Since then, my colleagues' decision cannot reasonably rest on the notion of a special class, it must be taken as overruling the precedents, i.e., as holding that any advance contractual promise inconsistent with the exercise of the privilege extinguishes the privilege. If my colleagues' remarks about the need for a "close and direct" relation between promise and privilege leave any lingering doubts on this score, those doubts can be easily dispelled in this way: insert in a contract an express provision that one of the parties promises to divulge, to the other, information of a designated kind, and that the promissor surrenders his privilege with reference to oral testimony in so far as it would interfere with performance of that promise. Then, presto chango, up the chimney goes the privilege. Thus, if my colleagues' decision is generally accepted, the sole practical effect of the constitutional privilege will be to add a few words to a contract. So the high hopes of Madison and his fellows, expressed in this Fifth Amendment privilege, will end up in a rubber-stamp contractual clause. Especially will all government employees be stripped of the privilege—by contract. Before long, rubber-stamped out of existence, the privilege will be but a quaint item of antiquarian lore.

United States v. *Field*, supra, 193 F. 2d at 107.

The courts below and appellee here also rely on the case of *Zap* v. *United States*, supra, to support the proposition that the privilege against self-incrimination can be waived by prior contract. However, we find the case in-

apposite to the present situation. There a defense contractor under a cost-plus contract with the Navy had agreed in his contract to allow the government to inspect his accounts and records. In the course of an audit of the contractor's books by the government a cancelled check was discovered and seized which indicated he had fraudulently misrepresented his costs to the government. In upholding the admission of the check into evidence in a subsequent criminal trial, the Court held that the contractor "voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts". Id. at 629. While, as the Court noted, there is a close interplay between the Fourth and Fifth Amendments, it must be obvious that there is also a qualitative difference between waiving the right to privacy as guaranteed by the Fourth Amendment and granting another the right to enter a specific geographic area and inspect and seize items of personal property found there and waiving the right to privacy granted by the Fifth Amendment and allowing the government to force a person to either provide evidence against himself out of his own mind and with his own tongue or face criminal sanctions.[6]

Finally, in order for a waiver to be effective, there must be "an intelligent relinquishment or abandonment

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6. The district court also relied on *Shirley-Herman Co.* v. *Internat'l Hod Carriers, Etc.*, 2 Cir., 1950, 182 F. 2d 806, and *Alabama Cartage Co.* v. *International Brotherhood*, 250 Ala. 374, 34 So. 2d 576 (1948), which indicate that the right to strike, as protected by the First Amendment, may be waived by a no strike clause in a prior collective bargaining agreement. Aside from the fact that it is clear in these cases that the right to strike was knowingly and intelligently waived in the collective bargaining agreements, it seems obvious that there is a difference between the right to strike and the privilege against self-incrimination and consequently a difference in the manner in which they may be relinquished.

of a known right of privilege". *Brookhart* v. *Janis*, 384 U.S. 1, 4, 86 S.Ct. 1245, 16 L.Ed. 2d 314 (1966), and *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1245, 82 L.Ed. 1461 (1938). In the situation before us, it is doubtful that Morgan knew, or ever contemplated, that as he signed the letter assenting to the terms of the bond application in 1960, which in no way made explicit any waiver of the privilege, that some five years later he would be in a position to assert the privilege in contravention of the terms of the application. It is difficult for us to find "an intelligent relinquishment or abandonment of a known right or privilege" in an event so remote from the advent of the circumstances making the assertion of the privilege possible. Cf. *Barber* v. *Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed. 2d 255 (1968).

II. *Waiver by Estoppel.*

In holding that Morgan was equitably estopped from asserting his privilege against self-incrimination to avoid divulging the identity, status and location of his assets in the state proceedings, the district court relied heavily on the cases of *Shepard* v. *Barron*, supra, and *Ralston* v. *Cox*, 5 Cir., 1941, 123 F. 2d 196, cert. den. 315 U.S. 796

In *Shepard* v. *Barron*, the Court held that where a landowner initiates a procedure under a state statute to issue bonds to finance the construction of a road adjacent to his property to be paid for by a frontage assessment on the adjacent land, served on the committee of landowners overseeing the project and paid his assessment for several years after the improvements have been completed, he is estopped to challenge the statute on due process ground, saying:

> Provisions of a constitutional nature, intended for the protection of the property owner, may be waived

> by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up. Certainly when action of this nature has been induced at the request, and upon the instigation, of an individual, he ought not to be thereafter permitted, upon general principles of justice and equity, to claim that the action which he has himself instigated and asked for, and which has been taken upon the faith of his request, should be held invalid, and the expense thereof, which he ought to pay, transferred to a third person.

194 U.S. at 568.

In *Ralston* v. *Cox*, supra, the defendant in a criminal prosecution demurred to the indictment and was successful in striking one of the overt acts set forth therein and then attacked the indictment as being constitutionally deficient as a result and causing the trial court to lose jurisdiction. The Court held that he was estopped to claim that the trial court lost jurisdiction by the order induced by his own motion, saying:

> If constitutional rights may be waived, as is well settled, [footnote omitted] they are also subject to the legal principles of estoppel. * * *
> 123 F. 2d at 198.

Thus in *Shepard* it was held that a person is equitably estopped from claiming that a statute is unconstitutional once he has availed himself of the benefits it provides,[7] and in *Ralston* it was held that a criminal defendant

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7. See also, e. g. *Pierce Oil Corp.* v. *Phoenix Refining Co.*, 259 U.S. 125, 42 S.Ct. 440, 66 L.Ed. 855 (1922).

is estopped to assert as a constitutional infirmity of his conviction an error which he induced. Needless to say, these cases do not hold that a person can be estopped to assert the privilege against self-incrimination and are generally inapposite to the instant case. Appellee cites no federal case, and we can find none, which hold that a person can be equitably estopped from asserting the privilege.[8]

Indeed, we have grave doubts that such could be the case. As was said in *Matsuo Yoshida* v. *Liberty Mutual Insurance Co.*, 9 Cir., 1957, 240 F. 2d 824, 829-830, a case involving the application of equitable estoppel to the defense of no coverage in an action to recover under a policy of liability insurance:

> Waiver and estoppel are legal terms which are frequently used interchangeably. Although the legal consequences of each are often the same, the requisite elements are different. Waiver refers to the voluntary or intentional relinquishment of a known right. It emphasizes the mental attitude of the actor. *On the other hand, estoppel is any conduct, express or implied, which reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law. It is grounded not on subjective intent but rather on the objective impression created by the actor's conduct. It is in the area*

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8. None of the other federal cases relied upon by U.S.F. & G. in its equitable estoppel argument involved the assertion of constitutional rights, much less the assertion of the privilege against self-incrimination. See *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 281, 79 S.Ct. 760, 3 L.Ed. 2d 770 (1959) (statute of limitation); *Dickerson* v. *Colgrove*, 100 U.S. 578, 25 L.Ed. 618 (1880) (conflicting claims to the ownership of land); *Investors Syndicate* v. *City of Indian Rocks Beach, Fla.*, 5 Cir., 1970, 434 F. 2d 871 (redemption of municipal bonds); *United States* v. *Fidelity and Casualty Co. of New York*, 4 Cir., 1968, 402 F. 2d 893 (statute of limitations); *Robinson* v. *Commissioner of Internal Revenue*, 6 Cir., 1939, 100 F. 2d 847, cert. den. 308 U.S. 567 (false representations in estate tax return).

of implied waiver that the two doctrines are closely akin.

The Supreme Court has held, however, that the relinquishment of the privilege requires "an intelligent relinquishment or abandonment of a known right or privilege". *Brookhard* v. *Janis*, supra, 384 U.S. at 4. It is therefore doubtful whether objective conduct alone, without subjective knowledge or intent, can ever prevent a person from asserting the privilege.

However, we do not find it necessary to so hold, in view of our conclusion that an estoppel in pais cannot be made out here, even if the doctrine were held to apply. The district court takes the view that U.S.F.&G. was induced to write the bond for the Shively project by Morgan's promise to provide it with financial statements upon reasonable demand and that it relied on this promise to its detriment. It is clear upon close analysis, however, that the inducement upon which U.S.F.&G. relied in writing the bonds here in question was Morgan's promise to indemnify U.S.F.&G. for any loss and the assets that stood behind this promise, not his promise to provide U.S.F.&G. with financial statements. As the Mississippi Supreme Court observed in its opinion affirming the decree awarding indemnity:

> Morgan executed the indemnity agreements in the negotiated jobs as indemnitor. He did this under an agreement with Hyde that he would receive a commission of two and one-half per cent of the contract price for acting as indemnitor or guarantor. The proof shows that he actually received this consideration to the tune of many thousands of dollars. Thus Morgan received a benefit for signing the indemnity agreements. It is not necessary that the consideration move from the indemnitee to the indemnitor, but it is necessary only

that there be a valid consideration to support the agreement. Furthermore, the proof in this case shows that there was an agreement between Bates, acting for Guaranty Company, and Morgan, that Morgan would execute all bond applications on jobs in which Morgan and Hyde were interested. It is a general rule that a guaranty of a preexisting debt or obligation of another is not binding on the guarantor without a new and independent consideration to support it. However, an exception to this rule is when the guaranty is connected with, and the inducement to the original credit or obligation, or a result of a previous promise by the guarantor upon the faith of which the credit was obtained, it requires no new or independent consideration, but is a part of the original transaction and the consideration upon which the credit was given. Standley v. Miles & Adams, 36 Miss. 434 (1958). *The antecedent promise of Morgan was the inducement to Guaranty Company to make the payment and performance bonds on the negotiated jobs, and was part of the consideration upon which the bonds were executed.* (Emphasis supplied.)

Morgan v. *United States Fidelity & Guaranty Co.*, supra, 191 So. 2d at 917-923. The tenuousness of this position is further demonstrated by the fact that while there were twelve bonds involved in the action for indemnity, the application of only one, the application for the Shively bond, contained the paragraph requiring financial statements and other financial information.

III. *Conclusion.*

In view of our holding here that Morgan has neither waived his privilege against self-incrimination by prior contract, nor is estopped to assert it by his conduct, the

order of the district court must be reversed and the matter remanded for the entry of an order directing the Chancery Court of Hinds County, Mississippi, to vacate its contempt decree and release Morgan from its effects.

This resolution, however, does not necessarily mean that Morgan cannot be required to provide the information demanded by the chancellor's decree. It is clear that the information "may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against" Morgan. *Gardner* v. *Broderick*, supra, 392 U.S. at 276. See *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed. 2d 678 (1964), and *Counselman* v. *Hitchcock*, 142 U.S. 547, 12 S.Ct. 195, 35 L Ed. 1110 (1892). It would be presumptuous for this Court to hold that an adequate immunity was available under Mississippi law and then order that Morgan be afforded this immunity. Thus, we leave the matter in the good hands of the courts of Mississippi. Morgan can be compelled to testify only if he is granted prior immunity from prosecution by the State of Mississippi.

The order of the district court is hereby reversed and remanded with directions.

REVERSED AND REMANDED.

GEWIN, Circuit Judge: Concurring in part and Dissenting in part:

Although I agree with much that has been said by my brothers in the majority opinion, I am unable to agree with all of their reasoning or with the result they reach. With complete deference and full respect for their well articulated views, I feel compelled to dissent in part.

While it may be presumptuous for this court to hold that adequate immunity is available to appellant Morgan

under Mississippi law, I do not believe such a holding to be necessary under the issues presented. Moreover, nothing said in this dissent is meant to reflect unfavorably upon "the good hands of the courts of Mississippi." Stated simply, it is my feeling that the State of Mississippi should not allow one court of the state, albeit a civil court acting in civil litigation, to compel a citizen to testify and make disclosures and then permit another court of the same state judicial system to use such evidence or disclosures in a criminal prosecution. The record does not indicate to me that the state proposes to follow such a course of action. The protections of the Fifth Amendment are applicable in every state and in every court. Otherwise the Supremacy Clause of the United States Constitution, Article VI, Clause 2,[1] would be meaningless. If appellant Morgan is required to obey the Chancellor's decree after vigorously asserting his Fifth Amendment rights, he should not then be subject to criminal prosecution based on such disclosures.

I would require appellant Morgan to obey the Chancellor's decree, or suffer the consequences of disobeying the civil contempt order subject to full immunity as indicated. This is not to say that there is any restriction or limitation upon the appropriate court or courts of Mississippi to modify or set aside the decree under consideration. Conceivably, the Fifth Amendment questions now presented in this case in its present form could be eliminated or become less important if the Chancellor's decree should be modified or set aside. In deciding that issue the state courts of Mississippi would pass upon questions of compelling state interest in the procedures of that state.

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1. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the *supreme Law* of the Land; and *the Judges in every State* shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (emphasis added)

Moreover, there is absolutely nothing in the record to suggest that there is any actual or real threat of a criminal prosecution by the State of Mississippi; but if such a prosecution does arise, Mr. Morgan should then be accorded complete immunity with respect to all evidence given and all disclosures made in obeying the Chancellor's decree. There is not the slightest suggestion that any federal criminal statute is involved.

We do not know whether appellant Morgan has removed any property from the state subject to a judgment lien, with intent to defraud. See § 2250, Code of Mississippi of 1942, recompiled. The other Mississippi statute, § 2252, gives the debtor the option of avoiding a criminal prosecution by discharging the lien or paying to the holder of such lien the value of the property involved in the event the same is less than the amount of the lien. Both statutes appear to be misdemeanors only.

There is ample evidence in the record to support the conclusion that appellant Morgan was the moving influence in all of the transactions under consideration. Large sums of money are involved. He made representations, promises and assurances in order to induce others to act. He profited from the transactions under consideration and asserted that he was well able to indemnify and protect those who were induced to act at his behest. Thus having induced, persuaded, promised and contracted to repay sums of money which he caused others to lose, he should be required now to face the day of judgment. He should not be permitted to nullify the Chancellor's decree by suggesting an imaginary and elusive possibility of a criminal prosecution for a misdemeanor which he could surely and certainly escape by returning the property, if any, which may be subject to a judgment lien. In that sense he holds the key to the prison door. I gain the distinct impression that Mr. Morgan's fear arises from the require-

ment of making the disclosures ordered rather than from the possibility of criminal prosecution for a relatively minor crime which does not appear to be imminent. Therefore, I would require Mr. Morgan to obey the Chancellor's decree in its present form, subject to the limitations herein expressed.[2]

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2. See, *e.g.*, Pennock v. West, 23 Pa. Dist. R. 1062, 43 Pa. Co. Ct. R. 16 (1914); Reese v. Baker, 123 So. 3 (Fla. 1929); Annot. 106 A.L.R. 383 (1937).

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION
Civil Action No. 4622

E. E. MORGAN,
Petitioner

VS.

FRED THOMAS, SHERIFF OF HINDS COUNTY, MISSISSIPPI, OR ANY OTHER OFFICER OF THE STATE OF MISSISSIPPI,
Respondents

UNITED STATES FIDELITY AND GUARANTY COMPANY,
Intervenor

(November 3, 1970, 321 F.Supp. 565)

Memorandum Opinion

This marks the premiere federal appearance of this extended and protracted litigation in the Mississippi State Courts arising out of a business relationship between the petitioner, E. E. Morgan, and the intervenor, United

States Fidelity & Guaranty Company (hereinafter called U.S.F.&G.). In view of the fact that their protracted legal pugilism will hereinafter be discussed in more detail, this Court will briefly state the nature thereof in order to bring the case sub judice into proper perspective. Morgan, an experienced contractor, who had large financial resources and was experienced in financing other transactions, in 1958 entered into a written partnership agreement with R. W. Hyde, Jr., also an experienced contractor who had been in the construction business since 1947, which enabled Hyde to secure the necessary financing to obtain payment and performance bonds for additional construction contracts which he desired. This partnership agreement covered bid jobs, and a separate agreement was entered into relative to negotiated jobs. Under this agreement, Morgan was to receive two and one-half percent commissions for signing applications for the bonds as indemnitor or guarantor. A copy of these agreements was furnished to U.S.F.&G. which had executed payment and performance bonds for and on behalf of Hyde, and thereafter, U.S.F.&G. executed additional payment and performance bonds for Morgan and Hyde totalling several million dollars. These bonds were issued in the name of Hyde or corporations controlled by him. Morgan signed the applications for bid job bonds individually and as co-partner, and where the jobs were negotiated, he signed the applications as indemnitor. Pursuant to these agreements of indemnity, U.S.F.&G. bound itself as surety on at least twelve different "constructions bonds".

The principals on twelve surety bonds defaulted, and various creditors filed suits on the bonds against U.S.F.&G. for labor and materials furnished in the performance of the contracts. U.S.F.&G. called upon the principals to defend these suits, but they failed to do so, and as a result, numerous judgments were rendered against U.S.F.&G., all of which it paid. Morgan was a principal and indemnitor on all of these construction bonds.

Consequently, after U.S.F.&G. had been compelled to pay the above judgments and related expenses, it sued Morgan, Hyde, and certain corporate defendants for reimbursement, indemnity, exoneration and specific performance.

Without now detailing the various state actions which have culminated in the filing of this Petition for Habeas Corpus, suffice it to say that the petition alleges that the decree of the Chancery Court of the First Judicial District of Hinds County adjudging him to be in civil contempt for failing to comply with its mandatory injunction to furnish a financial statement to U.S.F.&G. as required by the bond applications executed by him and to state under oath the identity, status and location of all his assets, would deny him his constitutional rights under the Fifth and Fourteenth Amendments of the Constitution of the United States. He therefore, prayed that a Writ of Habeas Corpus be granted and that he be released from the custody of the Respondent Sheriff of Hinds County or any other officer of the State of Mississippi in whose custody he has allegedly been committed, either upon his own recognizance or upon such bond and conditions the Court may impose; that the respondents be required to answer and make a return in due course and abide the further orders of this Court in relation to the detention of petitioner; that this Court conduct a hearing on the merits of this petition and that upon the hearing he be finally and

permanently released and discharged; and that pending the hearing this Court stay any proceeding against him in the Courts of the State of Mississippi except to allow him to file and prosecute an appeal from the civil contempt adjudication to the Mississippi Supreme Court.

The Chief Judge of this District by Order of March 9, 1970, ordered the release of the petitioner on his tendering an appearance bond in the penalty of $100.00, which was subsequently tendered and approved, and further ordered that pending the final hearing and decision on the merits of this case by the undersigned, the petitioner shall not be detained in custody, and that all proceedings, orders, and decrees against the petitioner in the Courts of the State of Mississippi shall be stayed and suspended except that an appeal to the Supreme Court of Mississippi from the Order of the Chancery Court in Cause No. 71194 thereof may be filed, prosecuted, and defended, until further orders of this Court.

The Respondents, Fred Thomas, Sheriff of Hinds County, Mississippi, and D. C. Yearwood, a Deputy Sheriff, who allegedly arrested and took Morgan into custody pursuant to the Order of Contempt of the Chancery Court, filed their answer and return herein contesting the allegations of the petitioner and praying for a dismissal of the Writ of Habeas Corpus, setting forth grounds in support thereof.

Subsequently, this Court granted the petition of U.S.F.&G. to intervene herein which it did by filing an answer and return almost identical to that filed by the respondents. Subsequently, the respondents and the intervenor were granted leave to and did amend their answers and returns, alleging that subsequent to the filing of their original answers that the petitioner had perfected an appeal to the Supreme Court of the State of Mississippi

from the subject civil contempt decree of March 9, 1970, and therefore allege that under the provisions of Title 28, U.S.C., Section 2254(b) and (c) petitioner is not entitled to maintain the present action because he has not exhausted his available state remedies.

In order to fully understand the contentions here in dispute, it is necessary to detail the background events leading up to the filing of the Petition for Citation for Contempt in the Chancery Court of Hinds County,[1] which subsequently resulted in the filing of this action.

U.S.F.&G. paid the previously discussed claims for labor and materials which were reduced to judgments against it, after notice to Hyde and Morgan. It then filed suit against Hyde, Morgan, and several corporations owned or controlled by each, asking for injunctive relief, specific performance, marshalling of assets, a money judgment or decree for its losses on the bonds, insurance premiums on certain insurance policies and attorneys' fees. After a lengthy hearing, the Chancery Court rejected Morgan's defense which attacked the validity of the bond applications on the grounds of (1) constructive fraud or fraud in law, (2) lack of consideration, and (3) that if any liability existed it was secondary to that of U.S.F.&G. assumed without their indemnification.

After a lengthy hearing, the Court tendered a decree awarding a money judgment in favor of U.S.F.&G. against Morgan for the sum of $2,642,568.35 plus the sum of $201,393.76 for insurance premiums. The decree also awarded a joint and several judgment against each of the defendant corporations in the sum of $377,124.99. The liability of Hyde and the corporations under his control was

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1. Cause No. 71194, Chancery Court, First Judicial District, Hinds County, Miss.

fixed, and a money judgment was awarded against them for an amount in excess of the judgment against Morgan. U.S.F.&G. was awarded $125,000.00 attorneys' fees against Morgan.

This decree was appealed only by Morgan and his corporations to the Mississippi Supreme Court, which affirmed the lower court.[2]

On September 3, 1965, U.S.F.&G. wrote Morgan a letter referring to the above decree and the provisions of a surety bond application executed in connection with a sewerage construction contract for the City of Shively, Kentucky, demanding and requesting that within ten days Morgan furnish U.S.F.&G. a financial statement showing his current financial condition, as he agreed to do by the terms of the application. In the meantime, Morgan had perfected an appeal without supersedeas from the foregoing decree, which was subsequently affirmed by the Mississippi Supreme Court. A petition for issuance of a Civil Contempt citation was filed by U.S.F.&G. with the Hinds County Chancery Court, setting forth the fact that Morgan did not furnish the required financial statement and did not comply with the above decree which had not been superseded. This citation was issued and served upon one of Morgan's attorneys; but neither he nor Morgan appeared in response thereto, and a decree pro confesso was rendered.

On November 12, 1965, a decree was entered in which Morgan was adjudged guilty of contempt for failure to furnish U.S.F.&G. the above requested financial statement, and the sheriff was commanded to take Morgan into his custody and commit him to jail until he purged himself

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2. *Morgan* v. *United States Fidelity & Guaranty Co.*, 191 So.2d 917 (1966). Hyde and his corporations did not participate in this appeal.

of contempt. After the entry of this decree, Morgan perfected an appeal with supersedeas to the Mississippi Supreme Court, which reversed the decree and dismissed the contempt proceedings.[3] In reversing the lower court, the Mississippi Supreme Court found that the Chancery Court decree, which Morgan had failed to comply with, was insufficient to support the charge of contempt because (1) it was not complete in itself and required reference to extraneous documents to ascertain what obligations Morgan was required to perform; (2) it was indefinite in that it did not require the performance of any specific acts; and (3) it could not be enforced as a decree ordering Morgan to furnish U.S.F.&G. a financial statement without construing the decree as one delegating to Morgan's adversary the power to determine what Morgan must do under penalty of contempt. The Court found that the decree could not be construed as one containing a mandatory injunction to do an affirmative act not mentioned therein, and that there was no duty on the part of Morgan to respond to the citation for contempt.

Morgan subsequently could not be found within the State of Mississippi for a period of time, but when he returned and could be served with process, U.S.F.&G. filed another action against him in the Chancery Court of Hinds County, Mississippi (1) to enforce the affirmed decree of July 23, 1965; (2) to enforce specific performance of Morgan's agreement to furnish U.S.F.&G. with financial statements showing his current financial condition; (3) to compel Morgan to disclose the nature and location of his assets; and (4) to obtain other equitable relief, including the appointment of a receiver. The 1967 Judgment of the Mississippi Supreme Court affirming the July 23,

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3. *Morgan* v. *United States Fidelity & Guaranty Co.*, 191 So. 2d 851 (1966).

1965 decree had previously been enrolled, and constituted a lien of all of Morgan's assets at the time that this second action was filed against him in January, 1967.

In answering the above allegations, Morgan admitted the validity and finality of the money decree and that it constituted a lien on his assets, but declined to answer the remaining allegations of Paragraph VIII of the Bill of Complaint, charging concealment of his assets, stating on oath that an answer thereof might tend to incriminate him. He expressly invoked the privilege against self-incrimination of the Fifth and Fourteenth Amendments to the United States Constitution and Article III, Sec. 26, of the Mississippi Constitution of 1890. A preliminary hearing was held on Morgan's claim of privilege and it was rejected by the Chancery Court. He was therefore ordered to answer on penalty of having the unanswered allegations of the Bill taken as confessed. Morgan then filed a Supplemental Answer under oath which reiterated his claim of the privilege against self-incrimination and continued to decline to answer the pertinent allegations of Paragraph VIII and contesting the demands in Paragraph IX for the production of a written financial statement and a written disclosure under oath, of the nature, amount and location of all his assets.

The Chancery Court reconsidered its Order directing an answer to the concealment allegation of Paragraph VIII, acknowledging the applicability of Sections 2250[4] and

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4. Section 2250, Mississippi Code of 1942, Rec., provides:
"If any person shall move, or cause to be removed, to any place beyond the jurisdiction of this state, any personal property which shall at the time of such removal be under written pledge, or mortgage, or deed of trust, or conditional sales contract, or lien by judgment, or any other lien in this state, with intent to defraud the pledgee, mortgagee, trustee, cestui que trust, conditional vendor, or creditor, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined not more than one thousand dollars ($1,000.00) or imprisoned in the county jail not more than twelve (12) months, or both."

2252,[5] making removal and concealment of assets subject to a lien (including a judgment lien) a criminal offense of larceny. The lower court held that the allegations of concealment in the Bill of Complaint were sufficient to bring the answer within the constitutional privilege against self-incrimination, and that this privilege did extend to an answer in Chancery.[6] However, the Court rejected the refused disclosure demanded in Paragraph IX of the Bill on the ground that there had been a specific contractual waiver of the Constitutional privilege under the terms of the "Shively" bond application which provided that Morgan would present a financial statement, on request, to the two sureties, including U.S.F.&G.

At the conclusion of the hearing in Chancery Court, the Court held that the action was properly brought; that a course of conduct was shown indicating Morgan's concealment of assets; that the case did not justify an injunction requiring Morgan to pay the judgment on pain of contempt; that Complainant was entitled to a full discovery

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5. Section 2252, Mississippi Code of 1942, Rec., provides: "Any person who shall remove, or cause to be removed, or aid or assist in removing from the county in which it may be, any personal property which may be the subject of a pledge, mortgage, deed of trust, conditional sales contract, lien of a lessor of lands, or lien by judgment, or any other lien of which such party has notice, without the consent of the holder of such encumbrance or lien, or who shall conceal or secrete such property, or who shall sell or dispose of the same or any part thereof without the consent of the mortgagee or beneficiary, or conditional vendor, whether any of these acts shall be done before or after the maturity of the debt secured by the lien, and shall not immediately discharge such encumbrance or lien or pay to the holder of such lien or encumbrance the value of such property in event same is less than the amount of such lien or encumbrance, shall, upon conviction, be imprisoned in the county jail not more than one year, or be fined not exceeding the value of such property, or both."

6. See *Bailey* v. *Muse*, 227 Miss. 51, 85 So.2d 918 (1956).

of the identity, status and location of Morgan's assets of every kind, including the names of persons having possession, custody or control thereof; that a receiver should be appointed for collection of his assets; that Morgan should be enjoined from disposing of any assets which might be owned by him; that he be required to furnish a financial statement; and whether this be done by a statement by way of discovery or by financial statement was immaterial. A Final Decree dated August 7, 1967 was signed and filed in accordance with the above opinion, from which Morgan appealed to the Mississippi Supreme Court, which affirmed the lower court.[7]

Paragraphs 6 and 7 of the above Decree adjudicated that U.S.F.&G. was entitled to have Morgan specifically perform his agreements and directed Morgan to furnish U.S.F.&G. with a financial statement in a specified form and a written statement showing certain specified information in regard to his assets and current financial position. In addition, the Decree appointed a general receiver to demand, collect and receive all the assets of Morgan for the purpose of enforcing compliance with the previous 1965 Decree. The 1967 Decree also required Morgan to transfer all of his assets to the general receiver, and he executed a quit-claim deed purportedly conveying all of his assets.

After the 1967 Final Decree had been entered, Morgan filed "Exceptions to Final Decree" in which he sought to invoke the privilege against self-incrimination as to Paragraphs 6 and 7 of the Decree respectively requiring him to furnish the written financial statement and the written information listing the nature, location and status of all his assets. After a hearing, the "Exceptions" were overruled.. Morgan then obtained a stay of the enforcement

7. *E. E. Morgan* v. *U.S.F.&G.*, 222 So.2d 820 (1969).

Paragraphs 6 and 7 of the 1967 Decree pending his appeal therefrom to the Mississippi Supreme Court.

After the Mississippi Supreme Court affirmed the Decree of the Chancery Court in all respects and remanded the cause to the Chancery Court for further proceedings in accordance with the lower court's Decree of August 7, 1967, Morgan petitioned the Mississippi Supreme Court for a rehearing which was denied on June 9, 1969. He then obtained from the Mississippi Supreme Court a stay of the enforcement of Paragraphs 6 and 7 of the Decree pending the filing of a Petition for Certiorari to the United States Supreme Court, which petition was filed and denied.[8] Nevertheless, Morgan persisted in his refusal to comply with Paragraphs 6 and 7 of the Decree of August 7, 1967, although he did on August 21, 1967 execute the above mentioned quit-claim conveying certain described assets to the receiver appointed by the Chancery Court.

U.S.F.&G. then filed a "Petition for Issuance of Citation for Civil Contempt" to enforce the provisions of the Decree of August 7, 1967. On February 20, 1970, the petitioner herein was cited to show cause why he should not be adjudged in civil contempt of the Chancery Court for failure and refusal to comply with the discovery ordered in Paragraphs 6 and 7 of the Final Decree. Morgan filed a response to this citation in which he claimed the privilege against self-incrimination based on the Fifth and Fourteenth Amendments, in view of Mississippi Code Sections 2250 and 2252 making it a misdemeanor to remove or conceal assets upon which a lien exists. After a full hearing was had in the contempt proceeding, in which both oral and documentary evidence were received, the Chancery Court on March 9, 1970 entered its Decree in which

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8. *Cert. den.* 396 U.S. 842 (1969).

it set forth its findings of fact and conclusions of law and adjudged Morgan to be in civil contempt of court by reason of his failure and refusal to furnish to U.S.F.&G. and to file with the Clerk of the Court the written financial statement described in Paragraph 6 of the Decree and the written disclosure of assets required by Paragraph 7 thereof. Further, it was ordered that he be taken into custody by the Sheriff of Hinds County to be committed to the Hinds County Jail until he complied with the above order and that he be fined $50.00 a day until he purged himself of contempt. Morgan's attorney and U.S.F.&G.'s attorney were present in open court when the Chancellor announced the above, ordered the Sheriff to arrest Morgan forthwith, and refused a request to stay the arrest.

When the respondent, D. C. Yearwood, Deputy Sheriff of Hinds County, was subsequently delivered two certified copies of the "Decree in Civil Contempt Proceedings" to be served upon Mr. Morgan, he proceeded to the law offices of Morgan's attorneys at their request to "handle the matter" in their office, where he found Morgan, his attorneys and a United States Deputy Marshal present. Yearwood placed the petitioner under arrest, and thereupon the United States Deputy Marshal served Yearwood with the Writ of Habeas Corpus and Order of this Court. Accordingly, Morgan was immediately released to the custody of the deputy marshal.

The legal questions to be resolved herein are: (1) whether at the time that Petitioner filed his petition herein, he was "in custody", a necessary prerequisite to the availability of federal habeas corpus relief; (2) whether the petitioner has exhausted his remedies available in the courts of the State of Mississippi, or stated differently, whether there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect his rights; (3) whether

the petitioner may, under the facts and circumstances of this case, invoke the privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States as a basis for refusing to comply with the state court Decree requiring him to furnish a financial statement to the intervenor and/or to furnish a written statement disclosing the location, status and nature of his financial assets; and (4) if the answer to the preceding question is in the affirmative, (a) whether petitioner has waived the privilege by failing to timely invoke it, and if not, (b) whether he is precluded from invoking the privilege through waiver, estoppel, or other conduct inconsistent with the exercise of the right, or by conduct showing an intention to waive it, or rendering it unjust to permit an exercise of the right; and (5) if petitioner is not precluded from invoking the privilege, whether he is exposed to any real and substantial hazard of incrimination by furnishing the written financial statement or the written statement disclosing the nature, location and status of his assets.

In considering these questions, this Court does so bearing in mind that they are federal questions to be decided by applicable federal standards and laws, as expressly agreed to by the parties herein in their briefs filed herein and as recognized by the Mississippi Courts.

I. At the time that Petitioner filed his Petition herein, was he "in custody", a necessary prerequisite to the availability of federal habeas corpus relief?

In order for habeas corpus to be available, the statute provides that the person seeking the writ must be "in custody."[9] Although Morgan had not been formally ar-

9. 28 U.S.C.A., Section 2241.

rested or served with a copy of the Decree adjudging him to be in civil contempt of the Chancery Court at the time that the Petition for Writ of Habeas Corpus was filed herein, the Chancery Court had previously ordered that he be remanded to the custody of the Sheriff of Hinds County, and placed in jail until he purged himself of contempt, and thus his arrest had been directed. Subsequent to the filing of the petition herein and the issuance of the Writ of Habeas Corpus pursuant to the Order of this Court, Morgan was formally placed under arrest in his attorneys' office by the respondent deputy sheriff, and it was at that time that the deputy sheriff was served with a copy of the habeas corpus Order and Writ by the deputy marshal.

It is axiomatic that actual physical custody or restraint is not required to confer habeas jurisdiction. Rather, the term is synonymous with restraint of liberty. The real question is how much restraint on one's liberty is necessary before the right to apply for the writ comes into play. The courts have long recognized that the writ is applicable to confinement under criminal and civil process.[10]

It is clear however that something more than moral restraint is necessary to make a case for habeas corpus.[11] The Court of Appeals for the Fifth Circuit has held in *Marden* v. *Purdy*[12] that an applicant who was free on bond was sufficiently "in custody" so as to satisfy the requirement for bringing a petition for the writ of habeas corpus. Also, the United States Supreme Court has held

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10. *Wales* v. *Whitney*, 114 U.S. 564, 571, 5 S.Ct. 1050, 29 L.Ed. 277 (1885).

11. Ibid.

12. 409 F.2d 784 (C.A. 5, 1969).

that if a prisoner has been released on parole, he is still "in custody" for purposes of habeas corpus.[13] Likewise, if he has been released on probation, he is said to be in custody.[14] In *Foster* v. *Gilbert*, a United States District Court held that an applicant who had been released to the custody of his attorney was sufficiently "in custody" to confer habeas corpus jurisdiction.[15] In *Foster*, the District Court, relying on *Jones* stated that "there are other restraints of a man's liberty, restraints not shared by the public generally, which are sufficient to support the issuance of habeas corpus, and that this writ has never been a static, narrow, formalistic remedy, but to the contrary, its scope has grown to achieve its purpose, that is, the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. The Court further held that while the petitioner had been released from arrest in the custody of his attorney, and such release freed him from immediate physical imprisonment, it imposed conditions which significantly confined and restrained his freedom, and that was enough to constitute "custody".

In *Ex Parte Fabiani*[16] the petitioner was a medical student studying abroad who received a letter from the United States Attorney informing him that if he did not return by a certain date to report for induction into the military, he would be indicted. The District Court held

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13. *Jones* v. *Cunningham*, 371 U.S. 236, 83 S.Ct. 326, 9 L.Ed.2d 285 (1963).

14. *Benson* v. *California*, 328 F.2d 159 (1964).

15. *Foster* v. *Gilbert*, 264 F.Supp. 209 (D.C. S.D. Fla., 1967).

16. 105 F.Supp. 139, 148 (E.D. Pa. 1952).

that the petitioner was in "constructive custody" of the government and that habeas corpus would lie. In a recent case the Fifth Circuit, in *Capler* v. *City of Greenville, Mississippi*,[17] held that a state defendant who had been released on an appeal bond was sufficiently "in custody" to entitle him to seek federal habeas corpus relief. In *Jones* v. *Cunningham*, *supra*, the Supreme Court further defined the meaning of "custody" as follows:

> "History, usage and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared with the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.
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> ". . . What matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the 'Great Writ.'" 371 U.S. at 240, 243.

The trend in the case law is clearly that of taking more and more serious any restraints that are imposed on a person's liberty, inasmuch as this great constitutional remedy is designed to protect individuals against erosion of their right to be free from wrongful restraints of any type upon their liberty.[18] This view was taken by the

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17. 422 F.2d 299 (C.A. 5, 1970).

18. See *Fay* v. *Noia*, 372 U.S. 391, 425, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). See also *United States Ex Rel Meadows* v. *State of New York*, 426 F.2d 1176, 1179 (C.A. 2, 1970) in which the Court of Appeals for the Second Circuit held that a parole detainer warrant issued by state authorities to have the petitioner delivered subsequent to the expiration of his federal sentence constitutes sufficient custody to render the remedy of habeas corpus available to challenge the state conviction; that the district court of the district within which petitioner had been sentenced had jurisdiction over habeas corpus petitions challenging future custody resulting from that sentence although the petitioner was presently incarcerated in an out of state district.

Court in *Foster* wherein the District Court stated that were it to hold that the petition must fail because the petitioner was not physically imprisoned, this would merely be upholding a technical defense which would no longer be available to respondents if petitioner's attorneys surrendered him to the authorities, whereupon undoubtedly he would file a second petition.

In view of the foregoing, this Court finds that the petitioner was "in custody" at the time that he filed his petition for Writ of Habeas Corpus herein. So, we move along to the next issue.

II. Has the Petitioner exhausted his remedies available in the Courts of the State of Mississippi, or is there either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect his rights?

The respondent and defendants contend that Morgan has not exhausted his state court remedies as required by 28 U.S.C.A. 2254.[19]

The Habeas Corpus Order signed by the Chief Judge of this District granted to petitioner the right to appeal his civil contempt decree here under attack to the Mississippi Supreme Court, the highest appellate court of the

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19. 28 U.S.C.A., Sec. 2254 provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

State of Mississippi. Petitioner, subsequent to the filing of his petition for habeas corpus herein, did perfect his appeal to the State Supreme Court pursuant to Section 1152 of Mississippi Code of 1942, Rec.[20] This section applies both to civil contempt and criminal contempt and gives the State Supreme Court a much broader than usual review of the decision of the trial court by empowering it to review the case and decide for itself whether there has been an actual contempt of court and fixes a specific nominal appeal bond not to exceed $300.00, which supersedes any punishment imposed.[21] The petitioner has executed and filed a supersedeas appeal bond in the state court in connection with his presently pending appeal.

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20. Section 1152, Mississippi Code of 1942, Rec., provides: "A person ordered by any tribunal, except the Supreme Court, to be punished for a contempt, may appeal to the court to which other cases are appealable from said tribunal, and may supersede any fine imposed, by the execution of a bond, payable to the state, with two sufficient sureties, to be approved by the tribunal appealed from, in a penalty to be fixed by said tribunal, not exceeding three hundred dollars, conditioned to pay the fine and costs, in case of affirmance in whole or in part; and the appellant shall be entitled to bail in such cases upon the execution of an appearance bond, with two or more such sureties, in the penalty of three hundred dollars, payable to the state, conditioned to appear in the court to which his appeal is prosecuted and to abide the result of such appeal, which may be approved by the sheriff or other officer in whose custody the appellant may be; and on such appeal the question shall be whether the appellant was guilty of contempt; and the sentence or decree or order of the court below may be affirmed, reversed, annulled, or modified, according to the judgment of the appellate court. All such appeals shall be tried on the record, and the presiding officers of all tribunals condemning any person for contempt shall, within one day thereafter sign bills of exception, if demanded, showing all the facts and evidence upon which such judgment was predicated."

21. See *Bryant* v. *Associates Discount Corp.*, 251 Miss. 1, 167 So.2d 657 (1964); *Ballew* v. *Case*, 232 Miss. 183, 98 So.2d 451 (1957).

It is a firmly established principle of federal law that ordinarily an application for habeas corpus by one detained pursuant to state authorities will not be entertained until all available state remedies, including all appellate remedies in the state courts, have been exhausted.[22] It is unquestioned today that the exhaustion provision "is not one defining power but one which relates to the appropriate exercise of power."[23] As stated in *Fay* v. *Noia*,[24] "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct the constitutional violation . . ." A solution was found in the doctrine of comity between courts, the doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter. *Darr* v. *Burford*, 339 U.S. 200, 204, 70 S.Ct. 587, 94 L.Ed. 761, 767 (1950); *King* v. *Cook*, 287 F.Supp. 269 (N.D. Miss., 1968). One commentator has succinctly stated it this way:

> "The *principal* requirement is that, if the doors of the state courts and the federal courts are both currently open, a state prisoner ought to try the state door first."[25]

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22. *Wilson* v. *Beto*, 415 F.2d 774 (C.A. 5, 1969); *Daniels* v. *Nelson*, 415 F.2d 323 (C.A. 9, 1969), reh. den. cert. den., 90 S.Ct. 494; *U. S.* v. *LaVallee*, 332 F.2d 890 (C.A. 2, 1964).

23. *Bowen* v. *Johnston*, 306 U.S. 19, 27, 59 S.Ct. 442, 83 L.Ed. 455 (1939).

24. 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963).

25. Reitz Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv.L.Rev. 1315, 1364 (1961). See also *Lynch* v. *Field*, 415 F.2d 776 (C.A. 9, 1969) in which the court stated:

The Fifth Circuit has recently stated that although the exhaustion principle is one of comity and not jurisdiction, that for a federal court to assume jurisdiction by habeas corpus of a case that was appealed to the state supreme court more than four months after the filing of the petition for habeas corpus in the federal district court would run directly contrary to the rationale that state tribunals should be afforded the initial opportunity to correct alleged abuses of constitutionally protected rights within their respective jurisdictions; and that absent exceptional circumstances it is incompatible with an orderly system of state and federal administration of criminal justice to allow an individual in state custody to proceed at the same time with two different remedies to secure his release.[26]

It has been held that the burden is upon the petitioner in such a situation to affirmatively set forth in his petition for habeas corpus what remedies he pursued in the state court and a justification, if any exists, for his failure to pursue any other state court remedy, and thus the burden is not upon the respondent to point out the state court remedies of which petitioner failed to avail himself.[27]

The prohibition of Section 2254 is mandatory, but it is apparent that there are two exceptions to the general re-

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"Nonetheless, he is asking both federal and state courts simultaneously to set aside the same conviction. If a federal court worked on the same conviction at the same time as the state, it would be most unseemly. We are not required to do it and we will not do it." To the same effect is *Daniels* v. *Nelson*, 415 F.2d 323 (C.A. 9, 1969) and *Perry* v. *Decker*, 415 F.2d 773 (C.A. 5, 1969).

26. *Ames* v. *Middlebrooks*, 369 F.2d 113 (C.A. 5, 1966), *cert. den.* 87 S.Ct. 1050 (1967).

27. Id. at 115; *Thompson* v. *Overlade*, 216 F.2d 492, 493 (C.A. 7, 1954).

quirement that state remedies be exhausted, namely (1) when there is an absence of available state corrective process, or (2) the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.[28] The first exception is self-explanatory.[29] The rationale underlying the second exception is that a petitioner should not have to engage in an exercise in futility before he can come into federal court. This goes back to the foundations of the entire exhaustion doctrine, namely, to give the state courts the first opportunity to rule on a petitioner's contention. It is not intended to frustrate relief in the federal courts, and is in line with the Supreme Court's language in *Fay* v. *Noia*[30] that "our decision today affects all procedural hurdles to the achievement of swift and imperative justice on habeas corpus . . ."[31]

Stated another way, application to the state courts should not be necessary if it is reasonably clear that the state will refuse to take cognizance of the claim; the timely resolution of federal rights, as well as considerations of efficiency, should outweigh what could only be termed compulsive comity.[32]

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28. *Evans* v. *Cunningham*, 335 F.2d 491, 493 (C.A. 4, 1964); Sokol, A Handbook of Federal Habeas Corpus, Section 28, p. 119 (1965).

29. *United States Ex Rel. Kelly* v. *Maroney*, 414 F.2d 1228, 1230 (C.A. 3, 1969).

30. 372 U.S. 391, 435 (1963).

31. See also concurring opinion of Mr. Justice Rutledge in *Marino* v. *Ragen*, 332 U.S. 561, 564, 68 S.Ct. 240, 92 L.Ed. 170 (1947); but *cf. Ralph* v. *Pepersack*, 203 F.Supp. 752, 754 (D. Md. 1962).

32. Note, Federal Habeas Corpus for State Prisoners: The Isolation Principle, 39 N.Y.U.L.Rev. 78, 99 (1964).

However, the doctrine of exhaustion of state remedies embodied in 28 U.S.C.A. 2254 does not bar resort to federal habeas corpus if the petitioner has obtained a decision on his constitutional claims from the highest court of the state. Once the petitioner's constitutional contentions have been presented to the state court, it is not necessary to present them again by a different means.[33] Stated another way, it is now well established that once a claim has been adjudicated by a state's highest tribunal, that is ordinarily sufficient to permit a petitioner to seek federal habeas corpus redress without the necessity for successive rounds of state court litigation,[34] and he is not required to pursue alternate procedures for relief in the state courts based on the same grounds.[35] This principle holds true even though the highest court of the state could have based its decision on another ground.[36] The Fifth Circuit has held that federal constitutional questions unsuccessfully raised at the trial and upon appeal through all the state's courts need not be relitigated by state habeas corpus or other post-conviction remedies as a prerequisite to an application for habeas relief to a federal district

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33. *Brown* v. *Allen*, 344 U.S. 443, 447-450 (1953); *Roberts* v. *LaVallee*, 389 U.S. 40, 42-43 (1967); *Connors* v. *State of South Dakota*, 422 F.2d 122 (C.A. 8, 1970), *cert. den.* 90 S.Ct. 1881; *Capler* v. *City of Greenville, Mississippi*, 422 F.2d 299 (C.A. 5, 1970); *Mezzatesta* v. *Anderson*, 227 F.Supp. 267, 269 (D. Del. 1964).

34. *Grundler* v. *State of North Carolina*, 283 F.2d 798, 800 (C.A. 4, 1960).

35. *Fay* v. *Noia*, 372 U.S. 391 (1963); *U. S.* v. *Barwick*, 331 F.2d 597, 598 (C.A. 4, 1964).

36. *Irvin* v. *Dowd*, 359 U.S. 394, 406 (1959); *Wade* v. *Mayo*, 384 U.S. 672 (1948).

court.[37] So also, it has been held that a petitioner should not be required to pursue state remedies as a prerequisite to filing federal habeas corpus petition when the exact constitutional point being raised has been previously decided adversely to his contention by the highest court of that state in another case.[38]

The constitutional questions presented by petitioner herein as his bases for relief were specifically and clearly raised before the Mississippi Supreme Court in his previous appeal of the 1967 Chancery Court Decree.[39] The Mississippi Court stated:

> "The second predominant question of the suit is concerned with whether the constitutional privilege against self-incrimination afforded under the Fifth and Fourteenth Amendments to the Constitution of the United States and under Article 3, Section 26 of the Mississippi Constitution of 1890 applies in civil actions for discovery or to enforce disclosures under a Bill of Complaint which requires answer under oath, and which is directed by a final decree. If the constitutional privilege is applicable, we must also reach the question of whether it was waived through estoppel."

Although the state Supreme Court upheld the Chancellor's ruling granting Morgan the right to claim the privilege not to answer under oath the allegations of the Bill of Complaint charging that he concealed his assets and resorted to other devices for the purpose of hindering, de-

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37. *Hill* v. *Beto*, 390 F.2d 640, 641 (C.A. 5, 1968).

38. *Hayes* v. *Boslow*, 336 F.2d 31, 32 (C.A. 4, 1964); *Evans* v. *Cunningham*, 335 F.2d 491, 493-494 (C.A. 4, 1964).

39. *Morgan* v. *United States Fidelity & Guaranty Co.*, 222 So.2d 820 (1969).

laying and defrauding the appellee, U.S.F.&G., of its rights as a judgment creditor in view of Sections 2250 and 2252 of the Miss. Code of 1942, Rec., the former making it a criminal act to remove property subject to liens out of the state or out of the county without consent or with intent to defraud, and the latter making it a crime to conceal assets subject to a lien, the Court specifically stated that it did not reach the broad question of the application of the principles to the other aspects of the suit, that is, discovery of assets subject to the lien or testimony as to the location thereof, since it was not necessary to its opinion and ruling in view of its subsequent holding that there was a waiver of the privilege.[40] Although the exhaustion of remedies doctrine did not require appellant therein, petitioner herein, to seek certiorari in the United States Supreme Court before seeking this habeas corpus relief herein,[41] nevertheless he did unsuccessfully petition therefor.

The petitioner in this case plainly invoked all available state remedies and obtained a final determination of his constitutional claim from the Mississippi Supreme Court. This Court therefore holds that this case is governed by the principle that the doctrine of exhaustion of state remedies embodied in 28 U.S.C. Sec. 2254 does not bar resort to federal habeas corpus herein because petitioner's contentions herein have been before the Mississippi Supreme Court for decision and question of waiver at least has been decided adversely to the petitioner. In view of the foregoing authorities, it is not necessary for plaintiff to await the Mississippi Supreme Court's review of his appeal from his adjudication of civil con-

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40. *Morgan* v. *United States Fidelity & Guaranty Co.*, *supra* at 829.

41. *Fay* v. *Noia*, 372 U.S. 391, 435-438 (1963).

tempt which is now pending inasmuch as the precise questions on which he bases his appeal have been adversely decided by that court. Furthermore, it is extremely doubtful that the Mississippi Supreme Court which, is composed of the same members which affirmed the foregoing appeal would decide the issues any differently.

Even if this Court were in error in its above determination, 28 U.S.C. Sec. 2254 prohibits the *granting* of a Writ of Habeas Corpus prior to the exhaustion of remedies available in the courts of the state but does not forbid *denial* of a petition for the "Great Writ" on its merits though state remedies may not be exhausted.[42]

Having concluded that this Court has jurisdiction of this habeas corpus action, it is now necessary to decide the merits of the relief sought herein by examining the following remaining questions: may the petitioner under the facts and circumstances of this case, invoke the privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States as a basis for refusing to comply with the state court decree requiring him to furnish a financial statement to the intervenor and/or to furnish a written statement disclosing the location, status, and nature of his financial assets; if the answer to the preceding question is in the affirmative, (a) whether petitioner has waived the privilege by failing to timely invoke it, and if not (b) whether he is precluded from invoking the privilege through waiver, estoppel, or by conduct inconsistent with the exercise of the right, by conduct showing an intention to waive it, or rendering it unjust to permit an exercise of the right; and, if petitioner is not precluded from invoking the privilege, whether he is exposed to any real and sub-

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42. *Hill* v. *Beto*, 390 F.2d 640, 641 (C.A. 5, 1968); *U. S. Ex. Rel. Kelly* v. *Maroney, supra*, at 1231.

stantial hazard of incrimination by furnishing the written financial statement and/or the written statement disclosing the location and nature of his assets.

> III. May the petitioner under the facts and circumstances of this case, invoke the privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States as a basis for refusing to comply with the state court decree requiring him to furnish to the intervenor a financial statement and/or a written statement disclosing the location, status and nature of his financial assets?

The above question, phrased another way, is whether the Constitutional privilege against self-incrimination afforded by the Fifth and Fourteenth Amendments to the Constitution of the United States applies in civil actions brought to require production of the above written instruments reflecting information concerning a judgment debtor's assets, as directed by a final decree of a court of competent jurisdiction.

Although some repetition results, in view of the importance of the peculiar facts of this case it is necessary to briefly as possible state the history and factual background of this litigation in some detail while attempting to avoid unnecessary repetition of what has heretofore been set forth.

The petitioner contends that he is entitled to invoke the constitutional privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States by virtue of the fact that Sections 2250 and 2252 of the Miss. Code of 1942, Rec., make the removal or concealment of assets subject to a judgment lien, the crime of larceny. He further contends

that he is entitled to invoke the privilege against self-incrimination inasmuch as any evidence or information furnished by him might disclose that he did not quit-claim and deliver to the receiver *all* of his assets as required by the Decree, and thus would subject him to punishment for criminal contempt by the Chancery Court.[43]

Petitioner, an astute and experienced businessman, on January 1, 1958 formed a partnership with R. W. Hyde, Jr. in order to lend his considerable assets to Hyde's growing contracting business to enable Hyde to secure payment and performance bonds from various surety companies, including the intervenor herein. Thus, it became possible for Hyde to secure additional large construction contracts which he had found it difficult to do because of his limited financial capability. The intervenor, U.S.F.&G. began writing bonds for Morgan and Hyde, and Morgan furnished it his financial statements for the years 1956, 1957 and 1958, each of which showed he had a personal net worth substantially in excess of three million dollars. The Mississippi Supreme Court, in accordance with the Chancellor's findings of fact, found that U.S.F.&G., acting in reliance on the combined net worth and assets of Morgan and Hyde, was induced to write surety bonds on numerous construction projects involving many millions of dollars, and in each and every one of the twelve bonds in question, Morgan voluntarily and specifically bound himself to protect, reimburse, indemnify and exonerate U.S.F.&G. from any loss whatsoever on account of its suretyship and expressly agreed to place U.S.F.&G. in

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43. Section 1278, Miss. Code of 1942, Rec., dealing with criminal contempt reads as follows: "The Chancery Court or the Chancellor in vacation or Judge granting the writ, shall have the power to punish any person for breach of injunction, or any other order, decree, or process of the court, by fine or imprisonment or both, . . ."

funds with which to pay creditors on the projects.[44] Morgan executed indemnity agreements on the negotiated jobs under an agreement with Hyde that he would receive a commission of 2-1/2% of the contract price for acting as indemnitor or guarantor, which he actually received in the amount of many thousands of dollars.[45]

In connection with a large sewerage system construction contract for the City of Shively, Kentucky, Morgan likewise entered into an indemnity agreement with U.S.F.&G. and another co-surety, who wrote the surety bond on the above project, whereby he represented that his assets would be available for indemnification and further specifically agreed to furnish to the sureties financial statements showing his current financial position when requested to do so. This application also provided that it should be "liberally construed so as to fully protect and indemnify" U.S.F.&G.

It is the position of the respondents and intervenor herein that compliance by the petitioner with the production requirements of the Chancery Court Decree would present no real, apparent and appreciable hazard of self-incrimination by merely being required to furnish these statements; that he has waived the privilege by failing to timely invoke it as a defense to specific performance before the rendition of the final decree against him in the Chancery Court of Hinds County, Mississippi; and if not correct in either of the above two assertions, that based upon all of the facts of this case, including Morgan's specific agreements and his affirmative conduct, that he has waived and is estopped from claiming his constitutional

44. See *Morgan* v. *United States Fidelity & Guaranty Co.*, 191 So.2d at 923.

45. See *Morgan* v. *United States Fidelity & Guaranty Co.*, *supra*, at 923.

right against self-incrimination under the Fifth and Fourteenth Amendments in this civil case.

In deciding these issues, this Court, as did the Mississippi Supreme Court, recognizes that these questions are federal questions controlled by federal standards and should be scrupulously applied in making this determination.[46]. It is well established that the denial by the United States Supreme Court of certiorari from the decision of a state court is to be given no effect whatsoever by a federal court in determining the petitioner's right to be discharged in a habeas corpus proceeding.[47] Neither does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question.[48] Where the state court has reliably found that relevant facts, the United States District Court may defer to the state court's findings if fairly supported by the record, but may not defer to its findings of law, it being its duty to apply the applicable federal law to the state court fact findings independently.[49]

However, the United States Supreme Court has expressly held that a United States District Court is vested with a large measure of discretion in determining the weight to be given the prior state court adjudication. The

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46. *Fay* v. *Noia*, 372 U.S. 391 (1963).

47. *Brown* v. *Allen*, 344 U.S. 443 (1953); *Fay* v. *Noia*, *supra*, note 46.

48. *Fay* v. *Noia*, *supra*, note 46; E.G. *Rice* v. *Olson*, 324 U.S. 786, 65 S.Ct. 99, 89 L.Ed. 1367 (1945); *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Brookhart* v. *Janis*, 384 U.S. 1, 86 S.Ct. 1245, 17 L.Ed.2d 562 (1966).

49. *Townsend* v. *Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

Supreme Court has likewise held that the state court adjudication "carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues." *Brown* v. *Allen, supra*; *Fay* v. *Noia, supra*.

In this case, the petitioner has the burden of demonstrating that his constitutional rights have been infringed by the state court decision.[50]

It is firmly established that state courts are bound by the Fifth Amendment by force of the Fourteenth Amendment and by the standards enunciated by the federal courts.[51]

We turn now to the issue of whether the petitioner-judgment debtor's claim of privilege is well taken. We start with the basic proposition that the Fifth Amendment's protection against compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states. The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for such silence. What is accorded is the privilege of refusing to incriminate one's self, and the feared prosecution may be by either federal or state authorities.[52] The rights relating to this constitutional privilege is a federal question to be determined by federal standards.[53]

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50. *Irving* v. *Breazeale*, 400 F.2d 231, 236 (C.A. 5, 1968).

51. *Malloy* v. *Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

52. Ibid., *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964).

53. *Malloy* v. *Hogan, supra*, at p. 11; *Chapman* v. *California, supra*.

The constitutional privilege against self-incrimination extends to all judicial official hearings, investigations, or inquiries where persons are called upon formally to give testimony. A witness thus has this protection in a judicial proceeding in a civil or criminal case, barring any deposition or hearing therein, or an investigation or hearing by a grand jury, legislative committee, or an administrative official or board.[54] Also, the privilege belongs to the guilty as well as the innocent.[55] More specifically, the privilege has been applied to discovery.[56] In *Boyd*, a case dealing with seizure and forfeiture of property alleged to have been fraudulently imported without the payment of duties, the United States Supreme Court stated:

> "Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict a party of a crime or to forfeit his property. And any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers,

54. McCormick on Evidence, Par. 123, p. 259 (1924); *U. S.* v. *Kordel*, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970); *Gardner* v. *Broderick*, 392 U.S. 273, 276, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968); *McCarthy* v. *Arndstein*, 266 U.S. 34, 45 S.Ct. 16, 69 L.Ed. 158 (1924); *Counselman* v. *Hitchcock*, 142 U.S. 547, 562-564; *Boyd* v. *U. S.*, 116 U.S. 616, 633-635 (1886); *U. S.* v. *Saline Bank*, 1 Pet. 100, 104; 8 J.Wigmore, Evidence, Sec. 2257, at pp. 339-340 (McNaughton, Rev. 1961); See also *Bailey* v. *Muse*, 85 So.2d 918, 923 (Miss. 1956).

55. See *Brock* v. *U. S.*, 223 F.2d 681 (C.A. 5, 1955).

56. *Arndstein* v. *McCarthy*, *supra*; *U. S.* v. *Kordel*, *supra*; *Boyd* v. *U. S.*, *supra*; *U. S.* v. *Saline Bank*, *supra*; *Curcio* v. *U. S.*, 354 U.S. 118, 77 S.Ct. 1222, 1 L.Ed.2d 1225 (1957); *Bailey* v. *Muse*, *supra*, note 54.

to convict him of crime, or to forfeit his property, is contrary to the principles of a free government . . ." (116 U.S. 632).

While the central standard for the application of the privilege is that the person claiming it is confronted by substantial, real and apparent, as distinguished from trifling or imaginary, hazards of incrimination,[57] the liberality with which the privilege is viewed by federal standards is reflected by the United States Supreme Court's opinion in *Hoffman* v. *United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951), wherein it was held that the privilege could be validly claimed where an answer to an interrogatory could possible tend to incriminate or could possibly furnish a link in a chain of circumstances which might lead to criminal prosecution. In *Hoffman*, the Court stated:

> "This provision of the amendment must be accorded liberal construction in favor of the right it was intended to secure. Counselman v. Hitchcock, 142 U.S. 547, 562 [12 S.Ct. 195, 35 L.Ed. 1110], (1892); Arndstein v. McCarthy, 254 U.S. 71, 72-73, [41 S.Ct. 26, 65 L.Ed. 138] (1920).
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> "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. (Patricia) Blau v. United States, 340 U.S. 159 [71 S.Ct. 223, 95 L.Ed. 170] (1950). But this protection must be confined to instances where the wit-

57. See *Marchetti* v. *U. S.*, 390 U.S. 39, 53, 61, 88 S.Ct. 697, 19 L.Ed.2d 889, 901, 905 (1968); *Brown* v. *Walker*, 161 U.S. 591, 599-600, 16 S.Ct. 644, 40 L.Ed. 819, 822 (1896).

> ness has reasonable cause to apprehend danger from a direct answer. Mason v. United States, 244 U.S. 362, 365 [37 S.Ct. 621, 622, 61 L.Ed. 1198] (1917), and cases cited. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, Rogers v. United States, 340 U.S. 367 [71 S.Ct. 438, 95 L.Ed. 344] (1951), and to require him to answer if 'it clearly appears to the court that he is mistaken.' Temple v. Commonwealth, 75 Va. 892, 899 (1881). However, if the witness upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

To the same effect is *United States* v. *Costello*, 198 F.2d 200, 202 (C.A. 2, 1952).

Applying the above standards to the case sub judice, unlike the situation which existed in *Kirtley* v. *Abrams*, 184 F.Supp. 65 (U.S.D.C. N.Y., 1960) which merely dealt with a judgment creditor attempting to locate assets of the judgment debtor for satisfaction of its judgment, here, despite the fact that the petitioner, in compliance with one requirement of the Chancery Court decree, conveyed by quit claim to the receiver what purported to be *all* of his assets, the intervenor herein then filed this contempt

proceeding to require further discovery, taking the position that petitioner owns other assets which he failed and refused to disclose and ey pursuant to the order. By attempting to force t. titioner to furnish a financial statement and to give a statement in writing setting forth the identity, status, location and custody of his assets, the respondent apparently takes the position that the petitioner has concealed some of his assets subject to the judgment lien or has removed them from Hinds County or the State of Mississippi without intervenor's permission, which, in either event, would subject petitioner to prosecution for the crime of larceny under Sections 2250 and 2252 of the Mississippi Code. In fact, the respondent charges that petitioner has concealed some of his assets in order to avoid the judgment lien imposed thereon. Furthermore, petitioner contends that the information sought might tend to prove, or at least the intervenor hopes and in effect represents that it will prove, that petitioner did not comply with the order of the Chancery Court to convey *all* of his assets to the receiver, thus subjecting him to criminal contempt, which is in all respects equivalent to any other crime.[58] In this setting it is not *perfectly clear*, from a careful consideration of all the circumstances in this case, that the required disclosure by the petitioner *cannot possibly* have such tendency to incriminate. See *Hoffman* v. *United States*, 341 U.S. 479, 488.

IV. Has the petitioner waived the privilege by failing to timely invoke it, and if not, is he precluded from invoking the privilege through waiver, estoppel, or by conduct inconsistent with the exercise of the right, by conduct showing an

58. *Bloom* v. *Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968).

intention to waive it, or rendering it unjust to permit an exercise of the right?

The respondents and intervenor contend that the petitioner waived his privilege by failing to timely raise it in the state courts by virtue of the fact that in his defense in the 1967 case,[59] petitioner did not plead the privilege as a defense for his refusal to furnish a financial statement required by his agreement with U.S.F.&G. but simply pleaded res judicata based upon the Mississippi Supreme Court's affirmation in the "parent case";[60] that the 1967 suit expressly sought specific performance of Morgan's agreement to furnish the financial statements and that he failed to raise the self-incrimination defense or issue prior to the entry of the final decree of August 7, 1967, but raised it for the first time after the final decree had been entered through the filing of "Exceptions to the Final Decree".

The respondents and intervenor rely on the opinion of the United States Supreme Court in *United States Ex. Rel. Vjtauer* v. *Commissioner of Immigration*,[61] in which the Court held that the privilege against self-incrimination may not be relied on and must be deemed waived "if not in some manner fairly brought to the attention of the tribunal which must pass upon it."[62] Unlike the situation

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59. 222 So.2d 820.

60. *Morgan* v. *United States Fidelity & Guaranty Co.*, 191 So.2d 917 (1966).

61. 273 U.S. 103, 71 L.Ed. 560, 566 (1927).

62. See also *U. S.* v. *Kordel, supra.*

in *Vjtauer* and *Kordel*, in the case sub judice the petitioner did forcefully bring to the attention of the trial court, the Chancery Court of Hinds County, Mississippi, his claimed privilege against self-incrimination, and the court conducted a hearing on this plea and granted his right to refuse to answer the allegation concerning the concealment of assets, but did order him to furnish the financial statements and the further written evidence of the location, identity, status and custody of his assets.[63] Therefore, although the privilege could have been claimed at an earlier stage of the proceeding in the state court, it was nevertheless squarely presented to and decided by the Chancery Court and has been urged by the petitioner at each and every stage of the proceeding thereafter. Thus the contention of the respondents and intervenor that the privilege was waived by virtue of the fact that it was not timely raised and urged is without merit and rejected by this Court.

Having determined that the privilege against self-incrimination afforded by the Fifth and Fourteenth Amendments to the Constitution of the United States is applicable to the discovery required by the final decree of the state court, it now devolves upon this Court to determine whether this constitutional privilege was waived through estoppel, as was held by the Mississippi Supreme Court.[64]

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63. 222 So.2d 820, 829.

64. 222 So.2d 820, 828-833.

The question of waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law.[65]

Although a person may, by his acts, or omission to act, waive a constitutional right or provision, being unable thereafter to claim protection under it, or may be estopped to claim this privilege, at least if no public rights or interests, such as matters of public policy or morals are involved,[66] particularly by conduct rendering it unjust to permit the assertion thereof,[67] there is nevertheless a presumption against the waiver thereof, and for a waiver to be effective it must be clearly established that there was an intentional and voluntary relinquishment or abandonment of a known right or privilege.[68] So also, the doctrine of estoppel as applied to the right to question the constitutionality of a statute or the benefit of a constitutional right is not applied solely on technicalities, but must rest on substantial grounds of prejudice or change of position.[69]

In determining whether there has been any waiver of, or estoppel to claim, the privilege against self-incrimination afforded by the Fifth and Fourteenth Amendments

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65. *Garrity* v. *New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967); *Brookhart* v. *Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966).

66. 16 C.J.S., Constitutional Law, Sec. 89, pp. 264-265.

67. *U. S.* v. *Nudelman*, 104 F.2d 549 (C.A. 7, 1939), *cert. den.* 308 U.S. 589, 60 S.Ct. 115, 84 L.Ed. 493; 16 C.J.S., Constitutional Law, Sec. 89, p. 267.

68. *Brookhart* v. *Janis*, 384 U.S. 1, 4, 87 S.Ct. 616, 17 L.Ed.2d 562 (1966); *Glasser* v. *U. S.*, 315 U.S. 60, 70-71, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); 16 C.J.S., Sec. 89, p. 267.

69. *State Ex Rel. Johnson* v. *Consumers Public Power Dist.*, 143 Neb. 753, 10 N.W.2d 784, 152 A.L.R. 480.

in the case sub judice, it is necessary to look to the peculiar facts hereof and discuss them in the light of the foregoing standards and hereinafter mentioned authorities.

As previously stated in this opinion and as found as a fact by the Mississippi Supreme Court, which finding this Court accepts and agrees with, U.S.F.&G. was induced to write the performance and payment bond in excess of two million dollars on the Shively, Kentucky project by virtue of the fact that the petitioner herein with his large amount of assets, had, by letter, expressly obligated himself to the terms and conditions of the application for the Shively performance and payment bond and indemnity agreement "just as though I were named as one of the applicants therein and my signature were duly affixed thereto."[70] The application for the bond in question, the provisions of which also made the petitioner an indemnitor of U.S.F.&G., reads in part as follows:

> "Tenth: A representative of the sureties shall have access at all reasonable times and places to the books and records of the said applicants and to correspondence with the representatives of said Obligee and shall be entitled to receive full information from the

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70. The body of this letter reads as follows:
"Attached is 'Application' for Performance and 'Payment Bonds and Indemnity Agreement' on Form No. 1 duly executed by R. W. Tyler Company, Inc., a Kentucky corporation, Louisville, Kentucky and R. W. Hyde, Jr., an individual d/b/a Hyde Construction Company, Jackson, Mississippi.

"In consideration of your executing as co-sureties the above described bond or bonds, I hereby agree as follows:

"That the signing and furnishing of this letter obligates me to the terms and conditions of the enclosed 'Application for Performance and Payment Bonds and Indemnity Agreement' on Form No. 1 just as though I were named as one of the applicants therein and my signature were duly affixed thereto. /s/ E. E. Morgan." See *Morgan* v. *United States Fidelity & Guaranty Company, supra,* at 831.

applicants and the banks of deposit of said applicants and shall be given such information as such representatives shall request, all as the same relate to the construction work to be performed by the applicants in connection with the contracts hereinbefore mentioned. . . . In addition to the above information to be furnished from, and the right given to the Sureties to examine, the books, records, correspondence and bank accounts of applicants as the same relate to said above mentioned contract, applicants and any of them will furnish to Sureties, upon request and at such reasonable intervals of time as Sureties may designate, financial statements showing the current financial position of the applicant of whom such request for a statement is made."[71]

With the assurance that Morgan, "an astute business man,"[72] who knew, or should have known, that one of the terms of the application was that the surety would have access at all reasonable times to the books and records of the applicant, would furnish to sureties upon request, and at such reasonable intervals of time, as sureties may designate, financial statements showing his current financial position, and relying upon this assurance, U.S.F.&G., together with National Surety Corporation, wrote the $2,721,419.00 Performance and Payment Bond which enabled Morgan and Hyde to secure this large construction contract. It was this contract, along with others, that produced large financial gain for Morgan in addition to the 2-1/2% commission he received by signing the bond applications as indemnitor or guarantor.

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71. See Exhibit "B" to the Bill of Complaint. (Chancery Court Transcript—PR-1, Rsps. 2-I, p. 26).

72. See 222 So.2d 820, 831 (1969).

As previously stated, Hyde started having serious financial difficulties in 1961 arising at least in part from the Shively contract which resulted in judgments against U.S.F.&G. by laborers and materialmen in excess of two million dollars. It was these losses and payment of the judgments resulting that gave rise to the beginning of this litigation by U.S.F.&G. against petitioner Morgan and which resulted in an adjudication that he is obligated to perform each and every obligation assumed by him under the application.[73]

The Mississippi Supreme Court has held that the above mentioned letter and application gave rise to the equivalent of a fiduciary relationship, that of principal and surety, citing 59 Am.Jur., Sec. 221 (1944), and that the surety is entitled to be protected by his principal, in this instance, E. E. Morgan.[74] The Mississippi Court further held that it was not necessary to discuss or decide whether the technical requirements of a waiver or estoppel were complied with, but that the matter stood in the posture similar to that which existed in *Shepard* v. *Barron*, 194 U.S. 553, 24 S.Ct. 737, 48 L.Ed. 1115 (1904), wherein the United States Supreme Court held that certain property owners had waived or were estopped to assert a denial of due process of law. In *Shepard*, the Supreme Court said:

> "Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a

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73. *Morgan* v. *United States Fidelity & Guaranty Co.*, 191 So.2d 917 (Miss. 1966).

74. 222 So.2d 830.

course of conduct which shows an intention to waive such provisions, and where it would be unjust to others to permit it to be set up.

* * *

". . . A defense of this nature and upon these facts need not be placed entirely upon the strict and technical principles of an estoppel. While it partakes very strongly of that character, it also assumes the nature of a contract, implied from the facts . . . It does not in the least matter what we may call the defense, whether it be estoppel or implied contract, or one partaking of the nature of both." 194 U.S. at 565 and 568, 24 S.Ct. at 741 and 742, 48 L.Ed. 1119-1121.

The State Supreme Court, after expressing doubt that in a civil proceeding it was ever intended that the privilege against self-incrimination could be transformed into an affirmative device whereby a judgment debtor can effectively thwart the processes of the Court under the peculiar circumstances of this case, held that the lower court did not err in finding that the appellant waived the right to assert the claim of constitutional privilege and that the trial judge was under no duty to broaden the privilege against self-incrimination to a point which would effectively place it beyond waiver. The Court principally rested its opinion on the following statements found in 8 Wigmore on Evidence, Sec. 2275 (McNaughton Rev. 1961) where it is stated:

"Waiver: (A) By contract. It has never been doubted that the privilege against self-incrimination, like all privileges (Sections 2196 and 2197, supra), is waivable. There are two possible ways of waiving: (a) by contract or other binding pledge before trial, or (b) by voluntarily testifying in the case (§ 2276

infra). As to the first of these ways, may a waiver be made irrevocably by contract before trial?

"Unless the contract is one which by its circumstances has come within the doctrine of duress or oppression, and is thus voidable on general principles of contract, there is no reason in its present aspect why it should not be binding. The promise to waive may be embodied in an express contract or in a contract implied by the conduct of the parties. In either case, however, two distinctions should be drawn:

(1) A bare contract to waive the privilege will not be enforced specifically. Rather, it will be enforced, where possible, by indirect sanctions similar to those (short of arrest and contempt) available to punish civil litigants who refuse to comply with orders to make discovery—e.g., dismissal of the action. Or the sanction may be loss of employment or of pension or of the right to do business with the government.

(2) Where there are not only the ingredients of an express or implied contract to waive privilege but also a fiduciary relation or other elements of public policy making recognition of privilege unconscionable, the waiver of privilege may be specifically enforced and the witness held in contempt for failure to make disclosure * * *"

The State Supreme Court further stated that the above principles of waiver of constitutional privilege against self-incrimination by contract have been applied in what it considered a "strikingly similar situation" found in the United States Supreme Court's opinion in *Zap* v. *U. S.*, 328 U.S. 625, 66 S.Ct. 1277, 90 L.Ed. 1477 (1946), which held as follows:

> "As we have pointed out in Davis v. United States, ante, p. 582, the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived. And when petitioner, in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts."[75]

The Mississippi Court found that sufficient fiduciary obligations and questions of public policy existed under the circumstances of the case sub judice necessary to furnish the prerequisites to the estoppel found in *Zap*, to uphold the judgment of the lower court which held that the appellant specifically waived the privilege.

As previously stated, it is well established that constitutional rights may be waived. In *Alabama Cartage Co.* v. *International Brotherhood*, 34 So.2d 576 (1948), the Alabama Supreme Court stated the following:

> "A party may waive a rule of law or a statute, or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right, and no considerations of public policy or morals are involved, and once having done so, he cannot subsequently invoke its protection. (cited cases are omitted) . . . The right to picket, protected by the provisions of the Constitution relating to freedom of speech, is a private, individual right, which may be waived and was waived by the individuals constituting the local organization by entering into

75. 328 U.S. at 628.

and becoming parties to the contract (collective bargaining agreement) which protected the complainant from strikes, and they are estopped to exercise this right in connection with a strike which they participated in calling, in violation of the terms of said contract." 34 So.2d at 579, 580.

So also, the United States Supreme Court in *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407, 412, 37 S.Ct. 609, 61 L.Ed. 1229, 1231 (1917), which was a suit by minority stockholders complaining of depletion and depreciation of the assets of the corporation resulting in deprivation of a just and fair value of their right and interest and shareholders, held that "there is no sanctity in such a claim of constitutional right as prevents its being waived as any other claim or right may be." The Court reasoned that the appellants by their action in instituting a proceeding for valuation of their stock pursuant to the statutes in question, waived their right to assail the validity thereof (citing Great Falls Mfg. Co. v. Attorney General, 124 U.S. 581; Electric Company v. Dow, 166 U.S. 489; Pierce v. Somerset Railway, 171 U.S. 641; Leonard v. Vicksburg, Shreveport and Pacific R.R. Co., 198 U.S. 416, 422).

In *Bartlett Trust Co.* v. *Elliott*, 30 F.2d 700, 705 (E.D. Mo. 1929), the Court stated:

"Even the provisions of the Constitution are not always available to the litigant. A person may by his acts or omission to act, waive a right which he might otherwise have under the Constitution of the United States. Provisions of a constitutional nature, intended for the protection of a property owner, may be waived by him when by a course of conduct it would be unjust to permit him to assert them . . . It

must be deemed to have waived its rights if any it had. It would be grossly unjust and inequitable to now grant the injunction sought (by the property owner)." 99 F.2d at 705.

In *Ralston* v. *Cox*, 123 F.2d 196 (C.A. 5, 1941), *cert. den.* 315 U.S. 796, 62 S.Ct. 488, 86 L.Ed. 1197 (1942), which was a habeas corpus proceeding against a United States Marshal for release from custody in which the appellant contended that he was entitled to the relief sought inasmuch as the action of the court in striking one count of the Indictment rendered null and void the trial verdict, sentence and commitment, the Court of Appeals for the Fifth Circuit, in holding that the appellant was not entitled to the relief requested inasmuch as the act done by the lower court was done at the request and insistence of the appellant, stated:

"If constitutional rights may be waived, as is well settled (cited cases omitted), they are also subject to the legal principles of estoppel . . . and he is now estopped to claim that jurisdiction was lost by an order induced by him, . . ." 123 F.2d at 198.

In *United States* v. *Benjamin*, 120 F.2d 521 (C.A. 2, 1941), a case in which the defendant in his appearance before the Grand Jury stated that he was going to claim his constitutional rights to answer questions, nevertheless freely answered them without raising constitutional objections, the Court quoted from Wigmore, Evidence, 2nd Ed., Sec. 2268 as follows:

"As Professor Wigmore has said, the privilege (against self-incrimination) is 'an option of refusal and not a prohibition of inquiry'."

The California Supreme Court in *Crest Catering Co.* v. *Superior Court*,[76] in holding that a privilege against disclosure may be waived by a prior contractual undertaking to furnish information upon request, stated:

> "Crest contends that the foregoing provisions do not waive the privilege because there is no specific reference either to the code provisions creating the privilege or to the tax returns. A waiver does not depend upon meeting such a brittle requirement . . .
>
> "A waiver may occur (1) by an intentional relinquishment or (2) as the result of an act which, according to its natural import, is so inconsistent with an intent to enforce the right as to induce the reasonable belief that such right has been relinquished. . . ."

In view of the fact that the doctrines of equitable estoppel and waiver by written instrument and conduct have been recognized to result in the relinquishment of a constitutional right, a closer look should be taken at those cases which explain and elaborate upon these legal principles. In *United States* v. *Wood*,[77] an action by the United States for the use and benefit of a private corporation, against Wood and others to recover for materials furnished for the construction of a United States Post Office building, the Court stated on page 82:

> "The doctrine of equitable estoppel is universally recognized by the Courts. . . . To establish equitable estoppel it is not necessary that actual fraud be shown. It is only necessary to show that the person

76. 62 Cal.2d 274, 398 P.2d 150 (1965).
77. 99 F.2d 80 (C.A. 4, 1938).

estopped, by his statements or conduct, misled another to his prejudice."

* * *

". . . If one acts on the faith of another's position, the latter is estopped from taking a different position to the detriment of the former (citing cases). Parties inducing another to act on reasonable belief that they have waived or will waive certain rights will be estopped to insist on them to his prejudice. An estoppel may be predicated on representations not made with fraudulent intent, if they are of such character as to induce the reasonably prudent man to believe that they were intended to be acted upon. (citing cases)"

In *U. S.* v. *Fidelity & Casualty Co. of New York*,[78] the Court of Appeals had the following to say concerning equitable estoppel:

"Equitable estoppel is a well-established concept invoked by courts to aid a party who, in good faith, has relied, to his detriment, upon the representations of another. A good statement of a rule, made with regard to litigation under the Miller Act, is found in McWaters and Bartlett v. United States, 272 F.2d 291, 296 (10 Cir., 1959), in which the Court stated:

'Estoppel arises where one, by his conduct, lulls another into a false security, and into a position he would not take only because of such conduct. Estoppel, in the event of a disputed claim, arises where one party by his words, acts, and conduct led the other to believe that it would acknowledge and pay the claim, if, after investigation, the claim was found to be just, but when, after the time for

78. 402 F.2d 893, 897-899 (C.A. 4, 1968).

suit had passed, breaks off negotiations and denies liability and refuses to pay.'

* * *

'To establish equitable estoppel it is not necessary that actual fraud be shown. It is only necessary to show that the person estopped, by his statements or conduct, misled another to his prejudice. . . .

* * *

'A person is estopped from denying the consequences of his conduct where that conduct has been such as to induce another to change his position in good faith or such that a reasonable man would rely upon the representations made * * * Nor is an express promise to waive the statute of limitations necessary to estop a party from pleading the statute as a defense.'

"In more recent authority, the Supreme Court has intimated that deception is not a necessary ingredient to estoppel. In Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959), a case arising under the Federal Employers Liability Act . . . The Supreme Court held . . . that plaintiff was 'justifiably misled into a good-faith belief that he could begin his action at any time within seven years after it had accrued.'

"Thus, we conclude that the absence of proof of fraud or deception on the part of Fidelity is not fatal to its being estopped to plead Miller Act limitations, where, as we have shown, there has been a representation, reliance, change of position and detriment."

This Court agrees with the finding by the Mississippi Supreme Court and the contention of the respondents and

intervenor herein that the case of *Zap* v. *United States, supra,* is applicable hereto. In *Zap,* the United States Supreme Court held that when the petitioner, in order to obtain a contract to do experimental work for the United States Navy, specifically agreed in writing to permit inspection of his accounts and records, he voluntarily waived his constitutional claims to privacy which he otherwise might have had with respect to business documents related to those contracts, and that a check seized by the Federal Bureau of Investigation in connection with this inspection was admissible in evidence. The Court did not, as contended by petitioner herein, rest its decision on or in any way refer to the "required business records" rule, but held that the appellant, Zap, had waived his constitutional rights to privacy or immunity. The Court stated:

> "As we have pointed out in Davis v. United States, [No. 404, decided this day] the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived. And when petitioner, in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts . . . (328 U.S. at 628).
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> * * *
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> ". . . the waiver of such rights to privacy and to immunity as petitioner had respecting this business undertaking for the government made admissible in evidence all the incriminating facts." (328 U.S. at 630).

The *Zap* case is cited as authority for the statement found in a recent text on Constitutional Law that "a per-

son entitled to the privilege against self-incrimination can knowingly and voluntarily waive the privilege in advance of questioning by a valid contractual consent."[79]

This Court has carefully read the *Zap* opinion and finds that it is not confined to public contracts inasmuch as there is nothing therein to indicate that a different result would have been reached if the contract had been between private parties. Rather, the decision is determined upon the fact that there was a conscious, voluntary waiver through a promise made to obtain the contract. Certainly, the right of the government in this connection can be no greater than the right of the individual, and the constitutional waiver test can be no different in dealing with the government than it can be in dealing with another.

In *Brown* v. *United States*, 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958), a leading case dealing with the application of the privilege in civil cases, the defendant took the stand and testified on direct examination, but refused to answer relevant questions asked on cross examination, invoking the privilege against self-incrimination afforded by the Fifth Amendment. Although there was no express or intentional waiver of the privilege, the Supreme Court applied a rule of constructive waiver and rejected the claimed privilege. In doing so, the Court laid stress upon the injustice and unfairness to the other litigant and to the Court that would result if the defendant were permitted to invoke the privilege, and said:

> "The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considera-

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79. Antieau, Constitutional Law, Sec. 2:34, p. 193.

> tions determining the scope and limits of the privilege against self-incrimination . . ." 356 U.S. at 156.

The Court thus emphasized the importance of the administration of justice between civil litigants as did the Mississippi Supreme Court in the following language:

> "Judgments and decrees are entitled to proper respect when rendered, and public policy requires nothing less. Citizenry of the state have a right to expect their orderly enforcement and the litigants, who have a direct personal or pecuniary interest in the outcome of the suit, have the basic right to demand the enforcement of the judicial process. The effectiveness of our entire court system rests upon the court's ability to enforce its judgments; otherwise they would become mere 'scraps of paper' evidencing only the good intentions of the court, and reducing its orders and attempted enforcement thereof to an exercise in futility . . ." (222 So.2d at 832).

In the case sub judice we are not dealing with a simple routine commercial transaction between parties, as contended by the petitioner, nor is there in question any vague or unconscious promise. To the contrary, what we have is petitioner, an astute, experienced business man expressly, voluntarily, and specifically by letter adopting, and binding himself by, all of provisions and conditions of the application for the surety bond on the Shively, Kentucky project wherein he promised the surety therein and intervenor herein, U.S.F.&G., access to all of his books and records relating to the contract and agreed to furnish to it upon reasonable request current financial statements showing his financial position, as well as pledging all of his considerable assets to indemnify the surety in the event of loss, which actually did occur in excess of over two million dollars. There was certainly consideration

for this promise and reliance thereon by the intervenor, U.S.F.&G. inasmuch as it would not have written this bond which gave rise to what the Mississippi Supreme Court found to be the equivalent of a fiduciary relationship, that of principal and surety, in the absence of Morgan's agreement. Thus, there was little doubt that the surety was entitled to be protected by his principal as voluntarily agreed, and that in reliance upon the promises to its subsequent detriment wrote the performance and payment bond.

Therefore, despite the presumption against waiver of constitutional privileges, which should be sparingly and cautiously applied, nevertheless, under the peculiar facts and circumstances of this case, this Court is of the opinion and finds that petitioner's constitutional privilege against self-incrimination afforded by the Fifth and Fourteenth Amendments was relinquished by his conduct which constituted a specific, deliberate and voluntary waiver and that he is, under the facts and circumstances hereof, estopped from claiming this privilege. To hold otherwise would be contrary to the established law, the equities of the situation and would be unconscionable.

The provisions of the tenth paragraph of the application in question that "a representative of the sureties shall have access at all reasonable times and place to the books and records of the said applicants" and shall have the right "to examine the books, records, correspondence and bank accounts of applicants as they relate to said above mentioned contract" and that "applicants and any of them will furnish to sureties, upon request and at such reasonable intervals of time as sureties may designate, financial statements showing the current financial position of the applicant of whom such request or statement is made", in this Court's opinion, constituted an agreement to furnish not only the written financial statement which the

Chancery Court and the Supreme Court of Mississippi by decree ordered the petitioner to furnish but also justifies the requirement that petitioner furnish the written statement concerning the identity, status, location and custody of his assets, particularly in view of the fact that Paragraph 15 of the application states that it "shall be liberally construed so as to protect and indemnify each of the sureties." In any event, if the Court is mistaken in this regard, it is perfectly clear that the financial statement must be furnished, and that petitioner's refusal to furnish it herein justifies his adjudication of civil contempt. It is well settled that partial invalidity of an order does not justify disregard of the valid parts thereof, and an alleged contemnor may question an order, which he is charged with disobeying, only insofar as he can show it to be void.[80]

This Court's previous order directing the release of the petitioner herein on bail shall be vacated and set aside, his petition filed herein for habeas corpus relief shall be dismissed with prejudice, and he shall be remanded to the custody of the appropriate Mississippi State authorities subject of course to his remaining at liberty if bail bond is furnished pursuant to Sec. 1157 of the Mississippi Code of 1942, Rec., pending his appeal to the Mississippi Supreme Court. Costs are to be assessed to the petitioner.

An Order conforming to the foregoing Findings of Fact and Conclusions of Law set forth in this Memorandum Opinion shall be presented to the Court within the time and in the form prescribed by the Rules of this Court.

/s/ Walter L. Nixon, Jr.
United States District Judge

Biloxi, Mississippi
November 3, 1970

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80. 17 C.J.S., Contempt, Sec. 14, pp. 40-41.

APPENDIX C

IN THE SUPREME COURT OF MISSISSIPPI

No. 45,195

E. E. MORGAN
Appellant

V.

UNITED STATES FIDELITY &
GUARANTY COMPANY
Appellee

(April 14, 1969, 222 So.2d 820)

PATTERSON, JUSTICE:

This is an appeal by E. E. Morgan from a decree of the Chancery Court of Hinds County which was entered pursuant to the prayer of a bill of complaint filed by United States Fidelity & Guaranty Company, appellee and cross-appellant.

The gist of the bill of complaint, which is in the nature of a "creditor's bill," is that United States Fidelity & Guaranty Company is a judgment creditor of E. E. Morgan under a 1965 decree of the Chancery Court of Hinds County in the sum of $2,642,568.35, plus attorneys' fees of $125,000*; that as a result of this judgment a lien was created against all of Morgan's assets and properties for the benefit of the complainant; that Morgan was the

*This decree was affirmed by this Court on November 7, 1966, in Morgan v. United States Fidelity & Guaranty Co., 191 So.2d 917.

owner of certain assets and properties which were subject to this lien, but that appellant concealed such assets and property and engaged in a fraudulent course of conduct deliberately designed to hinder, delay, and defraud appellee of the benefits of its lien and thereby evade and defeat the decree against him. The bill further alleges that under the provisions of the 1965 decree Morgan was obligated and specifically required, upon request, to furnish complainant a financial statement showing his current financial status. The bill sought specific performance of this obligation. Additionally, the bill averred that Morgan had a considerable amount of money and other assets, the location, value and particulars of which were unknown to the complainant, and which should in justice and equity be applied to the satisfaction of the judgment against Morgan. The bill contained a detailed prayer for relief, including a prayer for discovery of Morgan's assets and the appointment of a receiver.

In advance of filing his answer, Morgan, by leave of court, filed a special plea of res judicata, merger and estoppel, based upon the judgment in the parent case. After a hearing, the plea of res judicata was overruled and Morgan was granted leave to plead further. Thereupon he filed his answer which incorporated (1) a general demurrer, (2) a plea of nonjoinder of necessary parties, (3) a plea of res judicata, merger and estoppel by the former judgment, and (4) a denial of the legality of the writ of execution.

Paragraphs 8 and 9 of the bill of complaint are as follows:

(8)

Complainant further avers that the money judgment in favor of complainant against defendant is

and remains in full force and effect and has been affirmed by the Mississippi Supreme Court and there is now actually due to complainant thereon the principal amount of $2,968,962.11, together with lawful interest thereon from the date of the rendition thereof, together with the 5% damages provided by Section 1971, Mississippi Code of 1942, plus attorneys' fees of $25,000 allowed by the Supreme Court. Said judgment has been duly enrolled and constitutes a lien on the property of defendant. Complainant is informed and believes, and upon such information and belief avers that defendant has a considerable amount of money and of legal and equitable debts, claims and demands due to him from different persons, the names of whom are unknown to complainant, and that said defendant has a large amount of oil, gas and mineral interests and other interests in real estate, stocks of different kinds, securities, promissory notes and other evidences of debt, and other personal property, either in his possession or held in trust for him by others, the situation, value and particulars of which are unknown to complainant, and which ought in justice and equity be applied to the satisfaction of the aforesaid money judgment. Complainant avers upon information and belief that defendant has concealed his assets and resorted to other devices for the purpose of hindering, delaying and defrauding complainant of its rights as a judgment creditor, and complainant has no plain, adequate, speedy and complete remedy at law.

(9)

Complainant avers that in equity and good conscience the assets and property of the defendant should be applied to the satisfaction of complainant's

judgment against said defendant, and defendant should be compelled to discover, set forth and disclose all the estate, real and personal, of every description, including goods, chattels, money, book accounts, notes, bonds, mortgages, securities, evidences of debt and choses in action belonging to said defendant, whether standing in his name or in the name of or in the hands of any other person or persons for his use or in trust for him, and the names of the persons who have the possession, custody or control of such real or personal property.

In answering these allegations Morgan admitted the validity and finality of the money decree and that it constituted a lien on his assets, but declined to answer the remaining allegations of Paragraph 8, stating on oath that an answer in this regard might tend to incriminate him. He expressly invoked the privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Federal Constitution and Article 3, Section 26, Mississippi Constitution (1890).

A motion was filed by the complainant for determination of defendant's claim of privilege to refuse to answer. A preliminary hearing was held and the claim of privilege was rejected by the court on the premise that it had not been made apparent that a full answer would incriminate the appellant. Therefore, Morgan was ordered to answer on penalty of having the unanswered allegations of the bill taken as confessed.

Thereupon Morgan filed a supplemental answer under oath which reiterated his claim of the privilege against self-incrimination and continued to decline to answer the allegations of Paragraphs 8 and 9, answering in regard thereto as follows:

> Without admission or denial of implication in the crimes involved, this Defendant states on his oath that he fears that an answer could tend to incriminate him under several Mississippi criminal statutes, to which his attention has been called, including those referred to by his Counsel on said hearing, and that further factual explanation would tend to destroy the privilege which he claims under the Constitution of the United States and State of Mississippi.

Thereafter, the court reconsidered its order directing an answer to be filed and acknowledged the applicability of Mississippi Code 1942 Annotated section 2252 (1956), entitled "Larceny—removing property subject to lien out of the county—selling," to a judgment lien. It held that the allegations of concealment in the bill of complaint were sufficient to bring the answer within the constitutional privilege against self-incrimination and that this privilege did extend to an answer in chancery. The court concluded, however, that there had been a specific contractual waiver of the constitutional privilege under the terms of a bond application which provided that appellant would present a financial statement, on request, to the surety companies involved in that particular project. United States Fidelity & Guaranty Company was one of these companies.

Nevertheless, the chancellor upheld the claim of privilege as to that portion of the complaint which stated: ". . . defendant has concealed his assets and resorted to other devices for the purpose of hindering, delaying, and defrauding complainant of its rights as a judgment creditor." It was the opinion of the chancellor that "To hold otherwise would . . . possibly deny the right of immunity from self-incrimination in view of Section 2252, Code of 1942, Recompiled," and that "being forced to answer . . .

runs head-on into Section 2252 of the Code which does make such action a crime." The court further ruled that ". . . such averment shall not be taken as having been admitted or confessed by reason of defendant's failure to make answer thereto, nor shall it be considered that defendant has denied said above quoted averment of the Bill of Complaint." Other than the above statement the court reconfirmed its prior order and held that each averment of Paragraph 8 should be taken as admitted.

Thereafter, the hearing was held on the complaint and answer, including the pleas incorporated therein. The demurrer, plea of nonjoinder, plea of res judicata, merger and estoppel by judgment, were all preliminarily overruled. At the trial the complainant presented detailed evidence in support of its bill of complaint. Morgan could not be located for service of process, did not appear at trial, did not testify or offer testimony, and rested his case.

At the conclusion of the hearing the court held (1) that the creditor's bill was not maintainable under Mississippi Code 1942 Annotated section 1327 (1956), but was proper under the ancient equity practice, (2) that a course of conduct was shown indicating concealment of assets when regard was had to Morgan's failure to testify, (3) that the case did not justify an injunction requiring Morgan to pay the judgment on pain of contempt, (4) that complainant was entitled to a full discovery of identity, status and location of assets of every kind, including the names of persons having possession, custody or control of assets, (5) that a receiver should be appointed for collection of appellant's assets, and (6) that Morgan should be enjoined from disposing of any assets which might be owned by him. As to the discovery feature of the opinion, the chancellor ruled that he would require the appellant

to furnish a financial statement and that in any event the complainant was entitled to a full discovery, stating: ". . . and whether this be done by a statement by way of discovery or by a financial statement, I think it matters very little." A decree was taken in accord with this opinion from which Morgan appeals.

The court allowed supersedeas of those portions of the final decree which required the filing of financial statements and the making of discovery. Otherwise the application for supersedeas was denied.

On September 11, 1967, over a month after the entry of the final decree of August 7, 1967, appellant filed two motions. One motion was to vacate the final decree as being void, and the other was to disqualify and remove Frank J. Buchanan, the appointed receiver. The first motion was primarily addressed to the jurisdiction of the court. It urged that there had been less than fifteen days between the issuance of the writ of execution and the return date in violation of the requirements of Mississippi Code 1942 Annotated section 1900 (1956). This motion was overruled as the court was of the opinion that since Morgan had perfected an appeal prior to the filing of the motions, it had no jurisdiction to vacate its prior final decree though the court expressed itself as without jurisdiction in the first instance.

With regard to the second motion, the court ruled that the receivership was proper and necessary and therefore should be continued. However, the receiver's power to pursue and collect Morgan's assets, granted by the decree of August 7, 1967, was ordered to be held in abeyance and the receiver was directed to exercise no powers whatsoever except the following: "(a) to hold and preserve the assets which have heretobefore been or may hereafter

be conveyed and delivered to him as receiver; (b) to make disposition thereof only after first having obtained an order of this Court specifically authorizing such disposition, and (c) such other powers and authority as may, from time to time, be granted by this Court." It was further ordered that in the event the decree is affirmed by the Supreme Court of Mississippi, the receiver shall have and may exercise all of the powers originally granted by the decree. From the latter portion of this decree United States Fidelity & Guaranty Company perfected its cross appeal.

The principal questions presented by the direct appeal, which may also be considered as assignments of error, are:

1. Is a creditor's bill maintainable without a legal execution, followed by a return of nulla bona?

2. Can discovery be compelled against the claim of a privilege against self-incrimination under the Federal and State Constitutions?

Subordinate questions presented are:

1. The validity of the decree for specific performance.

2. The propriety of the appointment of appellee's agent as receiver with broad visitatorial and inquisitorial powers.

The cross-appellant, United States Fidelity & Guaranty Company, assigns as error, among other things, that the lower court erred in holding and directing that any of the powers of the receiver should be held in abeyance pending decision by the Supreme Court.

The first assignment of error is based upon the appellant's September 11, 1967, motion to set aside the final decree of the court because jurisdiction was never ac-

quired due to irregularities in the issuance of a writ of execution and its "nulla bona" return, and therefore the court had no authority to enter a decree. The appellant argues in support of the motion that the issuance of a writ of execution, with a *nulla bona return*, is the only manner other than under the provisions of Mississippi Code 1942 Annotated section 1327 (1956), in which the chancery court can acquire jurisdiction to hear a creditor's bill.*

The chancellor was of the opinion that the appellant's motion was meritorious. He expressed the conviction that the writ had been returned less than fifteen days after it was issued and was void under the provisions of Mississippi Code 1942 Annotated section 1900 (1956), and therefore the court had lacked jurisdiction to hear the bill in the first instance. However, he stated: "(T)his Court has no jurisdiction to decide the questions presented by movant regarding jurisdiction *vel non*, since this case is on appeal to the Supreme Court of Mississippi . . . ."

It is our opinion that the chancellor's conclusions were erroneous except as to the loss of jurisdiction due to the perfection of this appeal. One of the greater maxims of equity is that it delights to do complete justice and not justice by halves. In discussing this principle this Court stated in *Shaw* v. *Owen*, 229 Miss. 126, 132-33, 90 So.2d 179, 181 (1956):

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*This motion asserted, in addition, that the writ of execution had been executed against only one judgment debtor, appellant, although the judgment was against several parties, including R. W. Hyde, and therefore was in violation of Miss. Code 1942 Ann. § 1901 (1956). This argument is not persuasive since (1) the appellee had separate and several judgments against appellant and (2) Hyde surrendered all assets which had not been taken over by appellant.

> It is settled beyond question in this jurisdiction that where a suit is brought in the chancery court and the court takes jurisdiction on any one ground of equity, it will proceed in the one suit to a complete adjudication and settlement of every one of all the several disputed questions materially involved in the entire transaction, awarding by a single comprehensive decree all appropriate remedies, legal as well as equitable, although all the other questions involved would otherwise be purely of legal cognizance . . . Griffith's Chancery Practice, Sec. 28; McClendon v. Mississippi State Highway Commission, 205 Miss. 71, 38 So.2d 325; Myers v. Giroir, Miss., 84 So.2d 525; Duvall v. Duvall, Miss., 80 So.2d 752.

This principle has been held to apply, though the equitable ground on which the court obtained jurisdiction fails, and only strictly legal matters remain for determination. In *Duvall* v. *Duvall*, 224 Miss. 546, 554-55, 80 So.2d 752, 755 (1955), we held:

> "And in this state, the rule goes even to the extent that if the ground of equity fail under the proof, the cause may still be retained to a complete final decree on the remaining issues although the latter present legal subjects only and the decree would cover only legal rights and grant none but legal remedies — hat having taken jurisdiction the power of the court to administer full relief is limited by nothing but justice itself."

In this cause the following types of relief were sought by the appellant's bill of complaint: specific performance of contractual obligations, discovery, appointment of a receiver, and the issuance of an injunction. In Griffith, Mississippi Chancery Practice section 24 (2d ed.

1950) a number of subjects are set out over which a court of equity can assume jurisdiction. Among these are suits involving the specific performance of a contract, appointment of a receiver, discovery, and injunctive relief. We conclude that if the chancery court lacked jurisdiction to entertain this suit as a common law creditor's bill, there were allegations which put in issue other theories upon which the court could properly base its jurisdiction. We think it evident that the prayer in the bill of complaint for the appointment of a receiver was sufficient to vest the chancery court with jurisdiction and having once acquired jurisdiction, it extended to all issues in the case. *See* Shaw, *supra*, and Duvall, *supra*, and cases cited therein. We are of the opinion that this assignment of error is not well taken.

We think it appropriate, however, to comment on the lower court's opinion in regard to the manner in which a creditor's bill may be brought in the chancery court. Prior to the enactment of Mississippi Code sections 1843, 1844, and 1845 in 1880 the only way in which a creditor's action could be maintained in chancery was by reducing a debt to a judgment in a court of law, having a writ of execution issued on the judgment, followed by a nulla bona return thereon. Once this was accomplished a creditor had run the gauntlet of exhausting his remedies at law and might thereafter entreat the power of equity to grant aid in his behalf. Our cases in regard to this procedure seem to be in accord. In *Brown Bros. & Co.* v. *Bank of Mississippi*, 31 Miss. 454, 458 (1856), this Court stated:

> It is universally agreed that a creditor cannot go into a court of equity—until he has first obtained a judgment at law upon his debt, and issued execution, and had a return of "nulla bona."

The reason for these strict requirements seems to have been based on problems of jurisdiction rather than procedure. The early case of *Parish & Co.* v. *Joseph C. Lewis*, 1 Freeman 299, 306-07, explained the situation as follows:

> . . . [I]f you wish to reach legal assets of your debtor, and to remove obstacles which obstruct your course at law, it is sufficient that you show a judgment, creating a lien upon those assets; but if you wish to reach equitable assets, or other things not subject to execution at law, you must show that you have exhausted your remedies at law, by a return of an execution unsatisfied, as the foundation of your right to come into this court. In such case, the complainant's right to relief in this court depends upon his having run his execution at law without being able to satisfy his judgment. It is not a mere technical objection, but goes to the very foundation of the suit, and is not waived even by a general answer. The complainant must show an execution returned unsatisfied, and no state of facts will excuse such a return. Brinkerhof v. Brown, 4 John. Ch. R. [N.Y.] 671, 687; McElwain v. Willis et al. 9 Wendall [N.Y.] 548; Screven v. Bostick, 2 McCord's C. R. [S.C.] 416 [16 Am.Dec. 664]; Hadden v. Spader, 20 John R. [N.Y.] 554; Moore v. Young, 1 Dana's R. [Ky.] 516.

From these early cases it is apparent that the primary function of a "nulla bona" return on a writ was to show an exhaustion of legal remedies, so that a court of equity could assert jurisdiction.

In 1880 the legislature enacted the forerunner of what is now Mississippi Code 1942 Annotated section 1327 (1956), to ". . . prevent the necessity of a creditor resorting first to a court of law to recover a judgment and

then going into equity to secure its satisfaction. . . ." Griffith, Mississippi Chancery Practice section 500 (2d ed. 1950). The statute reads in part as follows:

> The said court shall have jurisdiction of bills exhibited by creditors who have not obtained judgments at law, or, having judgments, have not had executions returned unsatisfied, whether their debts be due or not, to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hindering, delaying or defrauding creditors; and may subject the property to the satisfaction of the demands of such creditors *as if complainants had judgments and execution thereon returned "no property found."* (Emphasis ours.)

It is evident from the statute that it had profound effects on the prerequisites for the maintenance of a creditor's bill. The procedure of obtaining a writ of execution and a nulla bona return was no longer necessary where sufficient facts could be pled to bring the cause within the purview of Section 1327. We are of the opinion that since the legislature has provided a means whereby a creditor can enter a court of equity by an appropriate bill of complaint, the requirement that he must resort to the more involved and antiquated common law procedure is no longer absolute and controlling. Here the complainant inter alia specifically alleged that appellant had "resorted to other devices for the purpose of hindering, delaying, and defrauding complainant of its rights as a judgment creditor." These are the precise words contained in Section 1327 and we think when taken in conjunction with other allegations, are sufficient to state a cause of action thereunder.

We are of the opinion that the court had jurisdiction in this case, and the fact that the nulla bona return was not made within the time prescribed by statute, did not divest the court of its jurisdiction. We do not mean by the foregoing to hold that a complainant cannot resort to the common law method to establish jurisdiction in a creditor's bill, but this procedure is no longer exclusive, as an action in the nature of a creditor's bill is also maintainable under Section 1327.

The second predominant question of the suit is concerned with whether the constitutional privilege against self-incrimination afforded under the Fifth and Fourteenth Amendments to the Constitution of the United States and under Article 3, Section 26 of the Mississippi Constitution of 1890, applies in civil actions for discovery or to enforce disclosures under a bill of complaint which requires answer under oath, and which is directed by a final decree. If the constitutional privilege is applicable, we must also reach the question of whether it was waived through estoppel.

The peculiar facts of this case are of particular import in considering the second assignment of error. The suit was brought to enforce a prior decree of the chancery court which adjudicated that complainant is entitled to specific performance of the obligations assumed by appellant under each of the various bond applications and indemnity agreements signed by him. It is a civil suit by a judgment creditor to enforce rights under an equity decree. It thus distinguishes itself from the cases cited by the appellant which relate to grand jury investigations and criminal cases. The privilege against self-incrimination in criminal prosecutions is absolute unless effectively waived. However, in civil cases the privilege is not so unequivocal. As a result there are material differences

in the rules governing the invocation of the privilege in criminal and civil cases. The following illustrations point to some of the differences. An accused in a criminal case may not be required to take the stand or give any testimony. To the contrary, a witness, if called, in a civil case must take the stand and answer all questions except those which would require him to give incriminating evidence. U. S. v. Housing Foundation, 176 F.2d 665 (3d Cir. 1949) and 98 C.J.S., *Witnesses*, § 441 (1957). Additionally, an adverse inference can be drawn from a defendant's refusal to testify in a civil case whereas no comment or inference might be drawn from the failure of a defendant in a criminal case so to do. In *Duratron Corp.* v. *Republic Stuyvesant Corp.*, 95 N.J. Super. 527, 533, 231 A.2d 854, 857 (1967), it is said:

> No constitutional protection is absolute. Traditionally, the courts have weighed each alleged assault on a constitutional right by comparing the social values, public or private, attending the measures impugned as invalid, with the degree of hazard if any to which the constitutional right or privilege was subjected by such conduct. See Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). The interest of the general public in the fair adjudication by courts of civil disputes between citizens ranks very high in the American polity. The permissible drawing by the factfinder of an inference of inability truthfully to deny a civil claim from a defendant's failure to testify as to relevant facts within his personal knowledge which might refute the evidence adduced against him, is a logical, traditional and valuable tool in the process of fair adjudication. It subserves private justice. We conclude that it does not impair the privilege against self-incrimination.

Moreover, the claim of privilege in a civil case is to be determined by the court and not by the witness as in a criminal case. State v. Myers, 244 Miss. 778, 146 So.2d 334 (1962); Hoffman v. U. S., 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951); and Rogers v. U. S., 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344 (1951). The yardstick of adjudication to be used by the courts in ruling upon the privilege in a civil case is whether there is a real and substantial hazard of incrimination resulting from a witness's answer to a bill of complaint or from his testimony in open court. See *Marchetti* v. *U. S.*, 390 U.S. 39, 53, 88 S.Ct. 697, 705, 19 L.Ed.2d 889, 901 (1968), wherein it is stated:

> The central standard for the privilege's application has been whether the claimant is confronted by substantial and "real," and not merely trifling or imaginary, hazards of incrimination. . . .

The chancellor first ruled there was not a substantial and real hazard of self-incrimination involved in the answer under oath, the discovery or the testimonial requirement of the decree; however, on reconsideration he was of the opinion that the claim of privilege should be upheld as to the bill of complaint wherein it states: ". . . Defendant has concealed his assets and resorted to other devices for the purposes of hindering, delaying, and defrauding complainant of its right as a judgment creditor." It was his opinion that: "To hold otherwise would . . . possibly deny the right of immunity from self-incrimination in view of Section 2252, Code of 1942, Recompiled," and that "being forced to answer . . . runs head-on into Section 2252 of the Code which does make such action a crime."

In analyzing the chancellor's findings of fact and their relation to Mississippi Code 1942 Annotated sections 2250

and 2252 (1956), which make criminal the acts of removing property subject to liens out of the state or out of the county without consent or with intent to defraud, we are unable to say that he was manifestly wrong as to the facts or that he misapplied the law with regard to Paragraphs 8 and 9 since the appellant was permitted the privilege as it related to these paragraphs of the bill of complaint. Though we think the chancellor's opinion in regard to Paragraphs 8 and 9 is contradictory to the decree permitting discovery, we cannot state that he erred in legal principle, the error, if any, consisting of the lack of conformity between the decree and the opinion. We conclude this specification of error is not well taken.

We do not reach the broad question of the application of the principles to the other aspects of the suit, i.e., answer under oath, discovery of assets subject to judgment, or testimony as to the location thereof, since it is not necessary to the opinion in view of our subsequent holding that there was a waiver of the privilege.

The next question for consideration and perhaps the most cogent of the suit is whether the appellant waived his constitutional privilege against self-incrimination. There is no doubt that an individual may waive the personal protections and privileges provided by the United States Constitution. See Sheppard v. Barron, 194 U.S. 553, 24 S.Ct. 737, 48 L.Ed. 1115 (1904). He may, of course, also waive the personal protections and privileges afforded by the Mississippi Constitution (1890). Waiver may be accomplished by a specific written agreement or by a course of conduct which indicates an intention to forego the privilege. The methods by which the privilege may be lost are discussed at length in 8 Wigmore on Evidence section 2275 (McNaughton Rev. 1961) where it is stated:

Waiver: (a) By contract. It has never been doubted that the privilege against self-incrimination, like all privileges (§§ 2196 and 2197 supra), is waivable. There are two possible ways of waiving: (a) By contract or other binding pledge before trial, or (b) by voluntarily testifying in the case (§2276 infra). As to the first of these ways, may a waiver be made irrevocably by contract before trial?

Unless the contract is one which by its circumstances has come within the doctrine of duress or oppression, and is thus voidable on general principles of contract, there is no reason in its present aspect why it should not be binding. The promise to waive may be embodied in an express contract or in a contract implied by the conduct of the parties. In either case, however, two distinctions should be drawn:

(1) A bare contract to waive the privilege will not be enforced specifically. Rather, it will be enforced, where possible, by indirect sanctions similar to those (short of arrest and contempt) available to punish civil litigants who refuse to comply with orders to make discovery—e.g., dismissal of the action. Or the sanction may be loss of employment or of pension or of the right to do business with the government.

(2) *Where there are not only the ingredients of an express or implied contract to waive privilege but also a fiduciary relation or other elements of public policy making recognition of privilege unconscionable, the waiver of privilege may be specifically enforced and the witness held in contempt for failure to make disclosure.* . . . (Emphasis ours.)

These principles have been applied in a strikingly similar situation by the United States Supreme Court. In

Zap v. *U. S.*, 328 U.S. 625, 66 S.Ct. 1277, 90 L.Ed. 1477 (1946), we find:

> As we have pointed out in Davis v. United States, No. 404, decided this day [328 US 582, ante, 1453, 66 S Ct 1256], the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived. And when petitioner, in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business document related to those contracts. 328 U.S. at 628, 66 S.Ct. at 1279, 95 L.Ed. at 1481-82.

The elements of public policy necessary for the application of estoppel are apparent in the *Zap* case since the contracts involved there were with the United States Navy. We think that sufficient fiduciary obligations and questions of public policy exist in this instance to uphold the judgment of the lower court which held that the appellant had specifically waived the privilege.

This Court has heretofore adjudicated that the appellant is obliged to perform each and every obligation assumed by him under each of the indemnity agreements. Morgan v. U.S.F. & G., 191 So.2d 917 (Miss. 1966). *See also* Morgan v. U.S.F. & G, 191 So.2d 851 (Miss. 1966), of interest to the former case and this opinion. In the first *Morgan* case the agreement of indemnity which was entered into with relation to a construction project in Shively, Kentucky was expressly passed upon by the lower court and held to be binding upon Morgan, and this decree was upheld by this Court. By necessity the lower court must have also considered in connection therewith

the letter of Morgan accepting the conditions of the Shively application agreement. These instruments, hereinafter detailed, give rise to the equivalent of a fiduciary relationship, that of a principal and surety. 59 Am. Jur. § 221 (1944). There can be little doubt that the surety is entitled to be protected by his principal, in this instance the appellant. Fidelity & Deposit Co. of Maryland v. Deposit Guaranty Bank & Trust Co., 164 Miss. 286, 144 So. 700 (1932) and Ames v. Dorrah, 76 Miss. 187, 23 So. 768 (1898).

In January 1960 R. V. Tyler Co., Inc. and Hyde Construction Company executed an "Application for Performance and Payment Bonds and Indemnity Agreement" Form No. 1. Its purpose was to obligate the appellee as a surety for the performance of a contract entered into by Hyde Contsruction Company and the City of Shively, Kentucky. The appellant obligated himself to the payment of this bond by letter as follows:

"Date January 25, 1960

"United States Fidelity and Guaranty Company
Baltimore, Maryland

National Surety Corporation
San Francisco, California

Gentlemen:

Re: Your So-surety Bond Covering Contract
$2,721,419.00—R. B. TYLER COMPANY, INC., & HYDE CONSTRUCTION COMPANY, A JOINT VENTURE

Favor: City of Shively, Kentucky For construction of Sewage System for City Shively, Ky., Contracts 1, 2, 3, 4, 5 & 6

Contract & Bond dated January 25, 1960

Attached is 'Application for Performance and Payment Bonds and Indemnity Agreement' on Form No. 1 duly executed by R. W. Tyler Company, Inc., a Kentucky corporation, Louisville, Kentucky and R. W. Hyde, Jr., an individual d/b/a Hyde Construction Company, Jackson, Mississippi.

In consideration of your executing as co-sureties the above described bond or bonds, I hereby agree as follows:

That the signing and furnishing of this letter obligates me to the terms and conditions of the enclosed 'Application for Performance and Payment Bonds and Indemnity Agreement' on Form No. 1 just as though I were named as one of the applicants therein and my signature were duly affixed thereto.

Yours very truly,

/s/ E. E. Morgan
E. E. Morgan"

It is apparent that this letter is the product of an astute business man. He, of course, knew or should have known that one of the terms of the application was that the surety would have access at all reasonable times to the books and records of the applicant. Another term of the application is: ". . . applicants and any of them will furnish to sureties, upon request and at such reasonable intervals of time as sureties may designate, financial statements showing the current financial position of the applicant of whom such request or statement is made." In view of the terms of this application, appellant's letter acknowledging acceptance of such terms, and our prior opinion that the Shively agreement was a valid and binding instrument, we do not find it necessary to discuss whether or not the

technical requirements of a waiver of estoppel were complied with. The case stands in a posture similar to that which existed in *Sheppard, supra*, wherein the Court held that certain property owners had waived or were estopped to assert a denial of due process of law. In explaining the Court said:

> Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up. . . . 194 U.S. at 568, 29 S.Ct. at 742, 48 L.Ed. at 1120-21.
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> . . . A defense of this nature and upon these facts need not be placed entirely upon the strict and technical principles of an estoppel. While it partakes very strongly of that character, it also assumes the nature of a contract, 'implied from the facts'. . . It does not in the least matter what we may call the defense, whether it be estoppel or implied contract, or one partaking of the nature of both. . . . 194 U.S. at 565, 24 S.Ct. at 741, 48 L.Ed. at 1119.

Judgments and decrees are entitled to proper respect when rendered and public policy requires nothing less. The citizenry of the state has the right to expect their orderly enforcement and surely the litigants, who have a direct personal or pecuniary interest in the outcome of a suit, have the basic right to demand the enforcement of the judicial processes. The effectiveness of our entire court system rests upon the court's ability to enforce its judgments; otherwise they would become mere "scraps of paper" evidencing only the good intentions of the court, and

reducing its orders and the attempted enforcement thereof to an exercise in futility. The thought pervades that the constitutional privilege is largely related to criminal prosecution, which is only to say that the government or state must prove its case against an accused without the aid of the accused's testimony, if he desires to invoke the privilege. However, in a civil proceeding we express doubt that it was ever intended that the privilege could be transformed into an affirmative device whereby a judgment debtor can effectively thwart the processes of the court. Under the peculiar circumstances of this case, a deliberate course of conduct by a judgment debtor to evade the effects of a lawful judgment, we are of the opinion that the lower court did not err in holding that the appellant waived the right to assert the claim of constitutional privilege. The trial judge was under no duty to broaden the privilege against self-incrimination to a point which would effectively place it beyond waiver. *See* Zap, *supra*, and Crest Catering Co. v. Superior Court, 42 Cal. 110, 398 P.2d 150 (1965).

The next assignment of error is that there can be no specific performance of the contractual provision to produce a financial statement. The appellant contends that there can be no specific performance of this agreement as required by the "Shively" indemnity application since it is barred by res judicata or estoppel by judgment. The appellant argues that in the former case the appellee expressly sought relief by way of specific performance of the obligations assumed in the several bond applications including the one in question, and that the court declined to grant specific performance. An examination of the decree referred to indicates that the court found to the contrary and in fact adjudicated: "Said defendants are obligated to perform specifically each and every obliga-

tion assumed by them under the terms of each of the various bond applications and indemnity agreement signed by them in regard to the jobs and bonds described in the bill of complaint as amended," and the decree specifies the various construction projects for which bonds were sought, one of which was:

"1/25/60	City of Shively, Kentucky	For construction of Sewage System for City of Shively Kentucky; Contracts 1, 2, 3, 4, 5 & 6	$2,721,419.00

The indemnitors on this job being: R. W. Hyde Jr., E. E. Morgan, Hyde Construction Company, Inc. . . ."

We find no merit in this assignment of error.

The last question presented on direct appeal is the propriety of the judge's action in appointing a former employee of the appellee as receiver for collection of appellant's assets. Appellant vigorously asserts that the receiver should be a completely disinterested party; however, we note a lack of convincing authority to this effect.

In regard to this problem, we find in Griffith, Mississippi Chancery Practice section 474 (2d ed. 1950), the statement that:

> While it is the usual and better practice to appoint as receiver an entirely disinterested person, one indifferent as to all the parties, yet inasmuch as competency and capacity to perform the important duties assigned to him in the particular case in hand are requisites, it is within the discretion of the court to appoint one of the parties on good bond, if he stand

> in no improper relation to the cause. The chancellor acts in this matter upon his own judgment and in his own sound discretion, and is therefore not obliged to accept a person recommended or proposed by the parties; in fact, it may sometimes be his duty not to do so. . . .

We agree with the statement that the chancellor is largely left to his own discretion in selecting a receiver and generally is bound only by the qualification that such individual does not stand in an improper relation to either of the parties. After a close reading of the record we are agreed that the chancellor was well aware of the law in this regard, was satisfied that the individual selected was qualified and found no *improper* relations with either party. In the absence of a proof of abuse of discretion in the appointment of the receiver we upheld the chancellor's action in this regard. We conclude this assignment is not well taken.

The only assignment of error on cross appeal is the action of the lower court in holding certain powers of the receiver in abeyance pending this appeal because of objections to his competence by appellant. There is no need to reach this question in view of our decision that the chancellor was without error in his selection of the receiver. Since the decree of the lower court provides that the full powers of the receiver would be restored if the appeal resulted in an affirmance, which it does, we withhold further comment.

AFFIRMED ON DIRECT AND CROSS APPEALS AND REMANDED.

ETHRIDGE, C.J., AND JONES, INZER, AND ROBERTSON, JJ, CONCUR.

APPENDIX D

IN THE SUPREME COURT OF MISSISSIPPI

No. 46,097

E. E. MORGAN

V.

UNITED STATES FIDELITY & GUARANTY COMPANY

(March 1, 1971, 245 So.2d 587)

GILLESPIE, PRESIDING JUSTICE:

After affirmance and remand of this case pursuant to the opinion of this Court in *Morgan* v. *United States Fidelity & Guaranty Company*, 222 So.2d 820 (Miss. 1969), Morgan refused to comply with the August 7, 1967, decree. Civil contempt proceedings were then brought to enforce the 1967 decree. Morgan was adjudged in civil contempt by reason of his "willful and contumacious failure to furnish to the complainant and to file with the Clerk of this Court the financial statements and statement in writing" required by the decree of August 7, 1967. Morgan appealed to this Court from this decree adjudging him in civil contempt.

Morgan's argument on this appeal, that the decree is invalid in view of his claim of the privilege of remaining silent based on the Fifth Amendment of the Constitution of the United States, is essentially the same as that made by him and rejected by this Court on the former appeal. We are of the opinion that the decision on the former appeal was correct and the decree now before the Court should be affirmed.

AFFIRMED.

RODGERS, JONES, BRADY, AND SMITH, JJ., CONCUR.

ATTEST

A True Copy of decision rendered March 1, 1971.

This 15th day of March, 1971.

Julia H. Kendrick
Clerk
Supreme Court of Mississippi
By Frances Pilgrim.

(SEAL AFFIXED).

APPENDIX E

IN THE SUPREME COURT OF MISSISSIPPI

No. 44,074

E. E. MORGAN, MORGAN INVESTMENTS, INC. and 3100 CORPORATION

V.

UNITED STATES FIDELITY AND GUARANTY COMPANY

(November 7, 1966, 191 So.2d 917)

INZER, JUSTICE:

This is an appeal by E. E. Morgan, Morgan Investments, Incorporated and 3100 Corporation from a final decree of the Chancery Court of the First Judicial District of Hinds County, wherein appellee, United States

Fidelity and Guaranty Company, was awarded money judgments and other relief.

The main basis for the suit instituted by United States Fidelity and Guaranty Company (hereinafter called Guaranty Company) against appellants (hereinafter referred to as Morgan), and many other defendants including R. W. Hyde, Jr. and six corporations owned or controlled by Hyde, was certain agreements of indemnity contained in bond applications executed by Morgan and Hyde in favor of Guaranty Company. The bill of complaint alleged that Hyde and Morgan were partners engaged in certain features of Hyde's contracting business, that Guaranty Company had executed payment and performance bonds totaling several million dollars for and on behalf of Morgan and Hyde, and that Guaranty Company had sustained losses on these bonds. The bill as amended prayed for injunctive relief, specific performance, marshaling of assets, a money judgment or decree for its losses on the bonds, insurance premium on certain insurance policies, and attorney's fees.

Appellants answered and denied that a partnership ever was activated between Morgan and Hyde. The signatures on the bond applications were admitted, but the validity of the bond applications was denied, both on the ground of constructive fraud or fraud in law and the ground of lack of consideration. Appellants denied that Guaranty Company was entitled to any relief against them. In the alternative, they averred that if any liability existed, it was secondary to the liability that Guaranty Company assumed without appellants' indemnification. As a further alternative, appellants averred that such liability was pro rata only and should be apportioned equitably. No issue as to the amount of Guaranty Company's losses was raised.

Hyde also answered and denied that the partnership ever was activated. Hyde admitted liability, but raised certain issues as to the amounts claimed.

After a lengthy hearing, the chancellor found that there was no fraud, and that Morgan and Hyde were partners and as such executed the bond applications on the bid contracts. He found also that under the terms of the indemnifying agreement Morgan was liable for attorney's fees. He found that Guaranty Company was entitled to recover the full amount sued for from Hyde and Morgan.

The decree awarded a money judgment in favor of Guaranty Company against Morgan for the sum of $2,642,568.35, plus the sum of $201,393.76 for insurance premiums. The decree awarded also a joint and several judgment against each appellant corporation in the sum of $377,124.99. The liability of Hyde and the corporations under his control was fixed, and a money judgment was awarded against them for an amount in excess of the judgment against Morgan. The attorney's fees were fixed at $125,000, and a judgment was awarded against Morgan for that amount. The decree awarded certain other relief not necessary to detail here.

The primary contention of Morgan is that the chancellor was in error in finding that there was no fraud on the part of Guaranty Company. In fact, it is argued that the chancellor's opinion reflects that he completely misconceived Morgan's defense of fraud in law. We do not so construe the chancellor's opinion. Inasmuch as the chancellor determined the factual issues in favor of Guaranty Company, we must consider the evidence in the light most favorable to Guaranty Company.

The facts are as follows. Hyde had been in the construction business since 1947. Over the years he had engaged in the general contracting business and had per-

formed numerous large construction jobs. Sometimes he contracted as an individual, and at other times he contracted through various corporations under his control. E. E. Morgan also was an experienced contractor who had large financial resources and was experienced in financing other transactions. By the middle of the year 1957 Hyde had expanded his operations to the point that he did not have the necessary financing to obtain bonds for more and larger contracts that he desired to bid on. In his operations he was performing two types of contract jobs. They were bid jobs, obtained as a result of competitive bidding, and negotiated jobs, on which the contract price was negotiated between the owner and the contractor without competitive bidding. Since Hyde had reached the point that he did not have financing to enable him to secure bonds to further expand his business, he worked out an arrangement with Morgan, whom he had known for many years and who had large financial resources, to join with him in order that he might further expand his business. This agreement was reduced to writing as articles of partnership in the early part of May 1958, the effective date being January 1, 1958. This partnership agreement covered bid jobs. A separate agreement was entered into relative to the negotiated jobs. Under this agreement Morgan was to receive two and one-half per cent commissions for signing the application for the bonds as indemnitor or guarantor. The facts leading up to these agreements are those upon which Morgan contends the fraud in law arose. They will be discussed later in this opinion.

A copy of these agreements was furnished to Guaranty Company, and thereafter Hyde and Morgan had no difficulty in getting Guaranty Company to write the contract bonds. The bonds were issued in the name of Hyde or

corporations controlled by him. Morgan signed the applications for bid job bonds individually and as co-partner, and where the jobs were negotiated, he signed the applications as indemnitor. Under this arrangement Hyde and Morgan obtained numerous construction contracts involving many millions of dollars.

On March 21, 1960, Morgan and Hyde entered into an agreement terminating the partnership as to future jobs. This agreement recited that on January 1, 1958, they had created the partnership and that it had served its usefulness, and that they desired to terminate the partnership and settle their affairs. The agreement listed the jobs then in progress, and Hyde agreed to assume liability for the obligations of the partnership, including any bond liability of Morgan. In the accounting between Morgan and Hyde after the dissolution of these two agreements, Morgan received in excess of $500,000 in cash and $316,000 in notes executed by Hyde in his favor.

In 1961 Hyde started having serious financial trouble, arising at least in part from the large construction contract known as the Keystone Dam Project in Oklahoma. Hyde notified Morgan and Guaranty Company of his difficulty. Conferences were had relative to the situation between Morgan, Hyde and the representatives of Guaranty Company. Guaranty Company took the position that it would not provide funds for the contract as long as there was a solvent principal in the bond, that principal being Morgan. Morgan then assisted Hyde on the Keystone job, after he had secured from Hyde other security.

Hyde became so short of working capital that many bills for labor and materials on various other jobs were unpaid. These claims were reduced to judgments rendered against Guaranty Company, and Guaranty Company paid them after notice to Hyde and Morgan. The amounts

paid up to the time of trial of this case were the basis of the judgment against Morgan and Hyde. There were still other claims pending which had not been reduced to judgment at the time of the trial.

Determining whether the chancellor was in error in failing to find that the evidence established fraud in law on the part of Guaranty Company requires us to detail to some extent the evidence on this point. There are three principal actors insofar as this scene is concerned. They are, Morgan, Hyde, and Lyle Bates, a representative and agent of Guaranty Company. Bates was a surety underwriter and a vice president of F. W. Williams Corporation, the general agent for Guaranty Company in Mississippi. Bates had known and dealt with Hyde since the time he went into the contracting business. He had also known and dealt with Morgan when he was active in the contracting business.

Morgan testified that prior to March 19, 1958, he had not discussed with Hyde any business arrangements whereby he would assist Morgan in securing larger contracts. Morgan said that on the above date Bates secured an appointment for Bates and Hyde to come to his office to see him, and that about one-thirty in the afternoon Hyde and Bates came to his office. On this occasion Bates told him that he, Bates, wanted Morgan to assist Hyde with additional bond credits over and above a ten million dollar line of credit Hyde had with his company. Bates explained to him that Hyde operated in two different categories. One was ordinary bid propositions where he bid in competition with other companies. The other was negotiated gas contracts; and on these he set his own price, resulting in his making a world of money in this field. Morgan said he told Bates that he did not know anything about Hyde's business. Bates replied that

Hyde had been most successful in all his operations, that he had a good organization with plenty of equipment, and he only wanted Morgan to sign a simple indemnity agreement on the negotiated jobs, but wanted him to cosign the bid jobs. He said his company had just made Hyde's bond on a $2,000,000 negotiated gas job in Mobile, Alabama, and for them to get together and date their contract to include that job. Morgan said Bates also informed him that Hyde had a lot of work lined up and was going to need bond credit over and above the $10,000,000 line of credit he had with Guaranty Company, in order to bid on some projects in a multi-million dollar highway program that was coming up. Morgan said that he relied upon these statements made by Bates, and as a result of these statements he entered into the partnership agreement relative to the bid jobs and the commission arrangement relative to the negotiated jobs. He said also that although the partnership agreement was executed, it was never activated, and that he and Hyde worked out another arrangement in its place. Morgan admitted that he signed the bond applications in question, but denied that he did so as a partner of Hyde. Morgan was specific in his testimony that this was the only conversation that he had with Bates relative to the affairs of Hyde.

It is Morgan's contention that, at the time Bates represented to him that Hyde had a $10,000,000 line of bond credit with Guaranty Company, these statements were false. He contends also that Bates knew at that time that Morgan was at or near his maximum capacity as a contractor and had already spread himself thin. Further, he contends that Bates knew his company had allowed Hyde to make complimentary bids on large contracts which they knew would be high, and that these practices were

used to convey the impression that Hyde was financially able to bond larger bids than he actually was able to finance. He contends that these and other matters which Guaranty Company knew about the true status of Hyde's business were concealed from him by Bates, and that had he been advised of the true facts of Hyde's condition, he would not have entered into any agreement to lend bond credit to Hyde. In other words, it is Morgan's contention that when Bates entered the scene and volunteered information concerning Hyde's bond credit and commended Hyde's ability as a contractor, he was duty bound to make a full disclosure. His failing to disclose material facts which would be pertinent to the assumption of the risk by Morgan amounted to fraud in law.

Hyde testified that he had known Morgan for more than twenty years, and that beginning sometime in September he had several conversations with Morgan relative to joining forces. He had an operating company, and Morgan had available bonding and banking credit. These conversations were several weeks apart. During that time, Hyde furnished Morgan with his operating and financial statement for the preceding two or three years. Morgan furnished Hyde with his financial statement for the preceding year. On February 8, 1958, Hyde went to the office of Morgan, and at that time they had a tentative agreement that Morgan would join him on performance and payment bonds. Their arrangement at that time was that Morgan would receive a two and one-half per cent commission of the contract price for executing the indemnity agreements. Hyde said that prior to this meeting Morgan had in his possession his (Hyde's) financial and operating statement. Hyde, upon return to his office, wrote a memorandum relative to their discussion, and, he said, mailed it to Morgan. He had a copy in his

file, and this was introduced in evidence. After this meeting until the partnership agreement was executed, Hyde said he kept Morgan fully advised relative to his operations. Hyde did not remember ever being in a meeting with Morgan when Bates was present, and did not recall any meeting on March 19, 1958. He said that after the partnership articles were signed, he and Morgan decided to handle their operations by his selling to Morgan fifty per cent of the stock in Hyde Construction Company, Incorporated, and that they handled their financial transactions through this corporation. Hyde denied that there was a partnership, but admitted writing a letter to Morgan and Guaranty Company on March 21, 1962, in which he made the statement that these liabilities now in question were undertaken during the time he and Morgan were partners.

Lyle Bates testified that as early as September 1957 he was requested to arrange bid bonds on three jobs for Hyde and Morgan. He said Morgan and Hyde told him they had entered into a joint venture to bid on these jobs. He remembered that Morgan came to his office on February 12, 1958, and brought his financial statement. He asked Morgan on this occasion how he and Hyde were going to do the work, and after some discussion, Morgan said that he would prefer to sign each application along with Hyde. Bates said he and Morgan had a definite agreement at that time that Morgan would indemnify Guaranty Company by signing applications on any jobs that Morgan and Hyde were interested in. After that time, Morgan told Bates that he and Hyde had reached a tentative agreement. Later, about March 12, 1958, Bates arranged, at the request of Morgan and Hyde, a bid bond for a $4,000,000 highway contract in Jones County. Bates said he went to Morgan's office on March 19, 1958, to discuss with Morgan the Jones County Project and some

other work projects that Morgan and Hyde were considering. He denied that Hyde was with him on this occasion. He said Morgan told him on one occasion, either on March 19, 1958, or earlier, that he had made a thorough investigation of Hyde's affairs, and that he thought it was as fine an organization as there was in this part of the country. Bates said he told Morgan at some time that Hyde had about nine million dollars worth of work on hand, and that Guaranty Company was handling a program for him of about ten million dollars, but he denied that he told Morgan that Hyde had a ten million dollar line of credit with Guaranty Company. He said he and Morgan at some time had discussed Hyde's reputation and his manner of operations, and he had told Morgan they were good. Morgan asked him what he thought about Morgan and Hyde getting together, and he told him he thought they would make a good combination. They were both experienced contractors, and he had only one hesitancy, which was whether they could get along together. Bates said that, after the partnership was formed, he received a copy of the agreement from Hyde, and that from then until he received a copy of the dissolution, he was not advised that they were not operating as a partnership.

It was from this conflicting testimony that the chancellor found there was no fraud, actual or constructive. It is apparent that the chancellor did not accept the testimony of Morgan. Although Morgan testified that he relied on the statements made to him by Bates, and that such statements were a contributing factor in his entry into the agreement with Hyde resulting in his executing the indemnifying agreements, the chancellor apparently believed this was not true. The chancellor, after discussing the situation of the parties and the facts as he saw them, had this to say about the question of fraud:

> This Court finds that there was no misrepresentation and no fraud practiced by Lyle Bates, representing the complainant, on the defendant, Ed Morgan. Not only is misrepresentation and fraud not proved by a preponderance of the evidence, but it hasn't been proved by any of the evidence, in this Court's opinion.

Morgan's statement that he relied on the statements of Bates is contradicted. The proof shows that on November 17, 1961, Morgan filed a suit against Hyde wherein he swore that he and his two appellant corporations had become indemnitors for Hyde by arrangement with Hyde, in order to enable Hyde to make the bonds with Guaranty Company. Prior to that time, on June 16, 1961, in an agreement with Hyde relative to the supervision and management of the Keystone project, it was stated that Morgan executed the bond application and indemnity agreement in favor of Guaranty Company at the special instance and request of R. W. Hyde, Jr. Morgan was asked on cross-examination, if the conference with Bates was responsible for his executing the indemnity agreements, why he said in the above instrument that he did so at the special instance of Hyde. He replied, "I can't answer that." The chancellor was amply justified in determining from the evidence that Bates did not make the statement attributed to him by Morgan, and that such statements as Bates did make were true, and had nothing to do with Morgan entering into the arrangement with Hyde.

Morgan also contends that the chancellor's opinion indicates that he was under the impression that Morgan was required to prove that Bates was solely responsible for his subsequent dealings with Morgan. As we understand the chancellor's opinion, what he said was that Mor-

gan would have him *believe* that Bates was solely responsible for the subsequent dealings with Hyde. As we understand Morgan's testimony, he did claim that it was as a result of his one conference with Bates on March 19, 1958, that he entered into the arrangement with Hyde. He emphatically denied that he ever had any discussion with Hyde or anyone else relative to an arrangement with Hyde to assist him in securing bond credit prior to this date. He said he never had any further discussion with Bates about the matter after this day. He stated that he placed full reliance on the statements that he said Bates made, and if Bates had not made them, he would not have entered into the business arrangement with Hyde. Thus it did appear from his testimony that he would have the court believe that these alleged statements of Bates were the sole reason for his entering the business arrangement with Hyde. The proof in contradiction of Morgan's testimony is so overwhelming that the chancellor evidently simply refused to accept any of his testimony. When the chancellor's opinion is read as a whole, we think it reflects that he clearly understood the issues, the testimony, and the law involved.

The chancellor resolved the factual issues on the question of fraud in law against Morgan and in favor of Guaranty Company. His findings are amply supported by the evidence, and we are not warranted in disturbing them. The citation of authorities to this effect is wholly unnecessary.

It is also urged by Morgan that there was no consideration for the asserted liability for the reason that the bond applications which contained the indemnity agreements were executed after the respective bonds were issued. We find no merit in this contention. The chancellor found that at the time the bonds for the bid jobs were

issued, Morgan and Hyde were actual partners as to these jobs. This finding is supported by the evidence. In fact, it is not seriously argued that the facts do not support this finding of the chancellor. The facts are for the most part the same as those set out in our opinion, *Morgan* v. *Jackson Ready-Mix Concrete,* 247 Miss. 863, 157 So.2d 772 (1963), wherein we held that the facts were sufficient to support the finding of the jury that a partnership existed between Morgan and Hyde. Morgan insists that if there was a partnership, it was brought about by the fraud in law practiced by Guaranty Company. This issue has been resolved against Morgan, and no further discussion of it is necessary.

Morgan executed the indemnity agreements in the negotiated jobs as indemnitor. He did this under an agreement with Hyde that he would receive a commission of two and one-half per cent of the contract price for acting as indemnitor or guarantor. The proof shows that he actually received this consideration to the tune of many thousands of dollars. Thus Morgan received a benefit for signing the indemnity agreements. It is not necessary that the consideration move from the indemnitee to the indemnitor, but is necessary only that there be a valid consideration to support the agreement. Furthermore, the proof in this case shows that there was an agreement between Bates, acting for Guaranty Company, and Morgan, that Morgan would execute all bond applications on jobs in which Morgan and Hyde were interested. It is a general rule that a guaranty of a preexisting debt or obligation of another is not binding on the guarantor without a new and independent consideration to support it. However, an exception to this rule is when the guaranty is connected with, and the inducement to the original credit or obligation, or a result of a previous promise by the guarantor

upon the faith of which the credit was obtained, it requires no new or independent consideration, but is a part of the original transaction and the consideration upon which the credit was given. Standley v. Miles & Adams, 36 Miss. 434 (1958). The antecedent promise of Morgan was the inducement to Guaranty Company to make the payment and performance bonds on the negotiated jobs, and was part of the consideration upon which the bonds were executed.

The only other assignment of error that we deem it necessary to notice is the assignment that the chancellor was in error in allowing Guaranty Company attorney's fees to pay its attorney for bringing this suit to enforce the indemnity contract. This question must be determined from the language of the indemnity agreement. Unless the indemnity agreement authorizes recovery of such fees, the court was without power to allow them. The pertinent part of the agreement is in the following language:

> SECOND, *to indemnify the Company against all loss*, damages, claims, suits, *costs and expenses whatever, including* court costs and *counsel fees at law or in equity, or liability therefor, which the Company may sustain or incur by reason of*: executing or procuring said bond, or procuring its release or evidence thereof from same, or investigating, defending, *prosecuting or settling any claim, suit or other proceeding which may be brought or threatened by or against any of the undersigned or the Company* in or allegedly *in connection with said bond* or any collateral security hereunder or *any of the agreements herein contained;* and to place the Company in funds before it shall be required to make any payment; . . . (Emphasis added.)

Morgan cites and relies upon *United States Fidelity and Guaranty Company* v. *Falk*, 214 Minn. 138, 7 N.W.2d

398 (1943), wherein this precise question was before the Court. The Court held that United States Fidelity and Guaranty Company could not recover counsel fees, and said:

> Here the agreement provides for indemnification for counsel fees "by reason or in consequence of its having executed said bond." Nothing is said as to attorneys fees to enforce the indemnity contract. Clearly, we think, only actions on the bond brought under its provisions were contemplated. 7 N.W.2d at 401.

However, the indemnity agreement in *Falk* reads as follows:

> To indemnify and save the Company harmless from any and all loss, costs, charges, suits, damages, counsel fees and expenses of whatever kind or nature, which it shall or may, for any cause, at any time, sustain or incur, or be put to, by reason or in *consequence of its having executed said bond.* (Emphasis added.) 7 N.W.2d at 399.

It is apparent that there is a marked difference between the indemnity clause in *Falk* and the one involved in this case. It will be noted that the agreement here not only covers counsel fees which Guaranty Company may incur as a result of suits in connection with the bond, but covers also counsel fees that it may incur by reason of its prosecuting a suit in connection with any agreement herein contained, meaning in this case that any suit it was necessary for Guaranty Company to bring to enforce the indemnity agreements Morgan executed.

We think the foregoing clause is clear and unambiguous, and that the chancellor correctly construed it to mean that Guaranty Company was entitled to recover

reasonable attorney's fees incurred to enforce the indemnity agreement.

Guaranty Company filed a motion for allowance of attorney's fees for services in connection with this appeal. Inasmuch as we find no merit in the appeal, the motion is well taken, and should be sustained. It is our opinion that allowance of an additional fee in the amount of $25,000 is reasonable for such services, and the fee will be fixed for this amount. T. M. Strider & Co. v. Western Cas. & Sur. Co., 10 So.2d 350 (Miss. 1942).

AFFIRMED.

ETHRIDGE, C.J., AND RODGERS, JONES AND BRADY, JJ., CONCUR.

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1152

E. E. MORGAN,
Petitioner-Appellant,

versus

FRED THOMAS, SHERIFF OF HINDS COUNTY, MISS, ETC.,
Respondent-Appellee,

UNITED STATES FIDELITY & GUARANTY COMPANY,
Intervenor.

Appeal from the United States District Court for the Southern District of Mississippi

---

On Petition for Rehearing and Petition for Rehearing En Banc

(Opinion Sept. 17, 1971, 5 Cir., 1971, ... F.2d .....).

(November 15, 1971)

Before BROWN, Chief Judge, GEWIN, and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular

active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Judge Gewin dissents from the denial of the petition for rehearing and the petition for rehearing en banc.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1970

No. 71-1152

D. C. Docket No. CA 4622

E. E. MORGAN,
Petitioner-Appellant,

versus

FRED THOMAS, SHERIFF OF HINDS COUNTY, MISS, ETC.,
Respondent-Appellee,

UNITED STATES FIDELITY & GUARANTY COMPANY,
Intervenor.

Appeal from the United States District Court for the Southern District of Mississippi

---

Before BROWN, Chief Judge, GEWIN and MORGAN, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court;

It is further ordered that respondent-appellee pay to petitioner-appellant, the costs on appeal to be taxed by the Clerk of this Court.

September 17, 1971

GEWIN, Circuit Judge: Concurring in part and Dissenting in part: Issued As Mandate:

APPENDIX H

Constitutional Provisions Involved

Article VI, Clause 2, Constitution of the United States:

> "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment V to the Constitution of the United States:

"ARTICLE [V.]

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV, Section 1 to the Constitution of the United States:

"ARTICLE XIV.

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-731

FRED THOMAS, SHERIFF, D. C. YEARWOOD, DEPUTY SHERIFF, and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioners,

vs.

E. E. MORGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NOTE: Unless otherwise indicated, emphasis in matter quoted in this Petition has been supplied.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

FRED THOMAS, SHERIFF, D. C. YEARWOOD, DEPUTY SHERIFF, and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioners,

vs.

E. E. MORGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners Fred Thomas, Sheriff, D. C. Yearwood, Deputy Sheriff, and United States Fidelity and Guaranty

Company,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of a majority of a panel of the United States Court of Appeals for the Fifth Circuit entered in this habeas corpus proceeding on September 17, 1971.

On the basis of the 5th Amendment privilege, said decision of the Fifth Circuit reversed the District Court and nullified a State court civil contempt decree that had been entered as a civil remedial process to enforce a prior State court decree. The prior State court decree had been affirmed by the Mississippi Supreme Court, and this Court had denied certiorari to review such affirmance.

As hereinafter shown in more detail, the decision of the Fifth Circuit is in direct conflict with two decisions of the Mississippi Supreme Court on an important question of federal law, and conflicts in principle with prior decisions of this Court.

OPINIONS BELOW

The opinions of the Court of Appeals, not yet reported, appear in the Appendix hereto. The opinion of the District Court for the Southern District of Mississippi is reported in 321 F.Supp. 565 (D.C. Miss. 1970), and appears in the Appendix hereto. (In accordance with Rule 23, this Appendix is separately presented.)

The two opinions of the Mississippi Supreme Court with which the decision of the Court of Appeals is in direct conflict are reported as follows:

E. E. Morgan v. *USF&G*, 222 So.2d 820 (Miss. 1969); certiorari denied 396 U.S. 842 (1969);

E. E. Morgan v. *USF&G*, 245 So.2d 587 (Miss. 1971).

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1. Petitioner United States Fidelity and Guaranty Company is hereinafter referred to as "USF&G." The Respondent E. E. Morgan is hereinafter referred to as "Morgan."

Copies of these two opinions are included in the Appendix hereto.

The opinion of the Mississippi Supreme Court in a companion or parent case is reported as *E. E. Morgan* v. *USF&G*, 191 So.2d 917 (Miss. 1966), and appears in the Appendix hereto.[2]

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 17, 1971. A timely petition for rehearing en banc was denied on November 15, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Whether Respondent Morgan, by the effect of his own voluntary acts and representations, including his express contractual agreement to furnish financial statements to USF&G upon request, has precluded himself from asserting the 5th Amendment privilege as an excuse for refusing to disclose his assets to USF&G in a civil suit brought for the legitimate noncriminal purpose of (1) enforcing specific performance of Morgan's voluntary contractual agreement to furnish financial statements to USF&G, and (2) for discovery of Morgan's assets.

2. Stated differently, the question is whether the District Court was correct in holding that Morgan is bound to disclose his assets to USF&G and is precluded by waiver and estoppel from refusing to do so on the alleged ground of possible self-incrimination, the finding of waiver and

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2. The 1969 decision of the Mississippi Supreme Court refers to this 1966 decision as the "parent case." 222 So.2d 820 at 822, App. C, p. A79.

estoppel being based on Morgan's voluntary representations and express agreements that make it inconsistent, unjust, inequitable and unconscionable to permit Morgan to invoke the privilege as an excuse for refusing to disclose his assets.

3. Alternatively, if Morgan has not waived or is not estopped to invoke the privilege, whether Morgan is exposed to any *real* and *substantial* hazard of incrimination and prosecution by merely disclosing the nature, situation, description, and character of his assets.

4. Whether Morgan was properly adjudged in civil contempt for his refusal to comply with that part of the State court decree which enforces specific performance of Morgan's voluntary contractual agreement to furnish financial statements, even if it be held that Morgan is not bound to comply with that provision of the State court decree which requires discovery under oath of Morgan's assets.

5. Whether, as strongly urged by the dissenting member of the panel below, under the 5th Amendment and the Supremacy Clause, the Federal courts should permit enforcement of the State court decree by affording a judicially established use immunity, and adjudicating that Morgan must furnish the information required by the State court decree, but he shall not be subject to any criminal proceeding based upon the information disclosed or its fruits.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are: The Supremacy Clause of the United States Constitution, Article VI, Clause 2; the Fifth Amendment to said Constitution; and Section 1 of the 14th Amendment to said Con-

stitution. These provisions appear in Volume 1 of the United States Code (1970 Ed.), at pages xlvii, xlviii, and xlix. Copies thereof are set forth in the Appendix hereto.

STATEMENT OF THE CASE

As expressly held by the District Court, a correct understanding of the facts is essential to a proper resolution of the issues.

Many of the controlling facts are set out in the opinion of the District Court and the 1966 decision of the Mississippi Supreme Court in the parent case (App. B and App. E).

As there shown, Morgan is an experienced contractor and wealthy financier who had considerable financial resources and was experienced in financing various types of transactions (App. B, p. A26). R. W. Hyde, Jr. (Hyde) was an experienced contractor who wanted to expand his business by taking on more and larger contracts, but did not have sufficient assets to enable him to obtain the necessary surety bonds for more and larger jobs. Accordingly, in order to increase their bonding capacity, and for the specific purpose of inducing USF&G to become their surety on more and larger jobs, Morgan and Hyde entered into two separate business agreements with each other.

In regard to contracts to be obtained by competitive bidding, Morgan and Hyde entered into a partnership agreement whereby they became *actual partners* on these projects. They also entered into a separate agreement under which Morgan was to receive a commission from Hyde for signing indemnity agreements on projects that were obtained by negotiation rather than by competitive bidding (App. B, pp. A26-A27).

Thereafter, by numerous representations, by furnishing copies of both of their business agreements to USF&G, by Morgan's furnishing copies of his financial statements to USF&G, and by executing bond applications and indemnity agreements, Morgan and Hyde were able to induce USF&G to become surety on the performance and payment bonds that were required of Morgan and Hyde in connection with the numerous larger projects (App. B, pp. A26-A27, A52).

Morgan orally promised and represented that he would indemnify USF&G on each and every job, and he also executed written bond applications and indemnity agreements to induce USF&G to become surety on each and every bond involved in the present controversy.

In every instance, USF&G acted in reliance on the representation and agreement that the combined net worth and combined assets of Morgan and Hyde were bound and would be available for the complete protection and indemnification of USF&G (App. B, p. A52). These representations and agreements induced USF&G to write surety bonds on numerous projects involving many millions of dollars (App. B, p. A52).

In regard to each and every bond, Morgan voluntarily and specifically agreed to fully reimburse, protect, and indemnify USF&G against any loss whatsoever on account of its suretyship. In every instance, Morgan expressly agreed to place USF&G in funds with which to pay creditors on the projects (App. B, p. A52).

All of the indemnity agreements expressly provided that they should be "liberally construed" in favor of USF&G.

In connection with a large project for the City of Shively, Kentucky,[3] Morgan expressly, specifically and personally bound himself to furnish USF&G financial statements showing his current financial position, when requested to do so (App. B, pp. A52, A76-A77). The Shively application provided that each applicant would:

> "furnish to Sureties, upon request and at such reasonable intervals of time as sureties may designate, financial statements showing the current financial position of the applicant of whom such request for a statement is made." (App. B, p. A65).

The Shively application also provided that it should be "liberally construed so as to fully protect and indemnify" USF&G.

In order to induce USF&G to become his surety on the Shively project, Morgan not only signed a printed form of indemnity agreement, but he also personally signed a letter in which he individually bound himself to all the terms and conditions of the Shively application *"just as though I were named as one of the applicants therein and my signature were duly affixed thereto."*[4]

All of these agreements were signed by Morgan in order to pledge his assets to the indemnification of USF&G so as to induce USF&G to become surety. The very pur-

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3. As late as March 1969, the City of Shively was continuing to assert a claim of over $3 million against the contractors, and USF&G was confronted with a potential claim for the full penalty of the performance bond. *City of Shively* v. *Hyde et al.*, 438 S.W.2d 512, 514 (Ky. 1969). The ultimate loss to the sureties on the Shively job was about $126,000 (Civil Contempt Record, pp. 124-126).

4. This letter is quoted in full in the opinion of the District Court (App. B, p. A63), and the 1969 opinion of the Mississippi Supreme Court (App. C, pp. A98-A99).

pose of Morgan's business association with Hyde was to induce USF&G to become surety (App. E, pp. A107-A109).

Thus, there can be no real question that, in every instance, USF&G bound itself as surety in reliance upon Morgan's numerous actions, promises, assurances, and agreements, *the composite effect of which was a deliberate representation that Morgan's extensive assets were bound and would remain available for the complete protection of USF&G.* Circuit Judge Gewin correctly states that there is ample evidence in the record to support the conclusion that *"Morgan was the moving influence in all of the transactions under consideration."* (App. A, p. A24).

From these contracting operations, Morgan withdrew more than $500,000 in cash, plus $316,000 in notes, which he took for himself as personal profits from this venture (App. E, pp. A109, A117-A118). Yet when laborers and materialmen began making demand for payment, Morgan not only refused to pay them, but he refused to place USF&G in funds with which to pay them, and he even refused to furnish USF&G with financial statements showing his financial position. USF&G made repeated unsuccessful requests for such financial statements, but Morgan has still not furnished such statements.

As a result of Morgan's attempted repudiation of his agreements, USF&G was required to pay out millions of dollars and to resort to litigation in an effort to compel Morgan to do that which he had voluntarily agreed to do. USF&G brought suit against Morgan and Hyde and certain corporations controlled by them, and recovered a final decree in 1965.

This 1965 decree expressly adjudicated that Morgan and the other defendants are obligated "*to perform specifically each and every obligation assumed by them under*

the terms of each of the various bond applications and indemnity agreement signed by them . . . and to exonerate and secure [USF&G] against ultimate loss in the premises on account of the execution of said bonds . . ." (App. C, pp. A97-A98, A101-A102). This 1965 decree also awarded money judgments in various amounts against the several defendants.

Hyde and his corporations did not appeal from the 1965 decree. Morgan and his corporations did appeal, and the Mississippi Supreme Court unconditionally affirmed the 1965 decree in 1966 (App. E, p. A105).

Morgan did not seek further review of the 1965 decree, and it has long since become final. Nevertheless, Morgan has refused to comply with that decree.

Following the 1965 decree, Hyde made a full disclosure of his assets to USF&G. *However, Hyde had no substantial assets, because Morgan had previously taken over virtually all of Hyde's assets.*[5]

On the other hand, Morgan continued a deliberate course of conduct designed to place his assets beyond the reach of USF&G. Morgan had embarked upon this course of action at the very time that USF&G was asserting its claim against him in the courts and at the very time he was professing to have a meritorious defense to that claim. Thus, shortly before USF&G obtained the 1965 decree against Morgan, he converted large real estate holdings into cash, and then, immediately after USF&G obtained

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5. The 1969 opinion of the Mississippi Supreme Court states: "Hyde surrendered all assets which had not been taken over by appellant [Morgan]." (App. C, p. A87) footnote. In the 1965 parent case the Chancellor found: ". . . What do we find Ed Morgan doing to Bob Hyde? . . . He ties him up lock, stock and barrel. *Everything that he can possibly take away from him, he does.*" (Parent case record, p. 1936).

the 1965 decree, Morgan closed out his bank accounts, closed out his brokerage accounts, and absented or concealed himself so that he could not be served with process.

Shortly after the 1965 decree had been entered, USF&G again requested that Morgan furnish USF&G with his financial statement. Morgan ignored this request.

In 1967, after Morgan returned to Mississippi and could be served with process, USF&G filed a second suit seeking (1) to enforce the 1965 decree, (2) to enforce specific performance of Morgan's agreement to furnish current financial statements, (3) to obtain a discovery of Morgan's assets, and (4) to obtain other equitable relief, including the appointment of a receiver (App. B, p. A32).

The 1967 complaint contained a detailed prayer for relief, including separate and distinct prayers for (a) specific performance and (b) discovery.

Paragraphs 3 through 7 of the 1967 complaint sought *specific performance* of Morgan's agreement to furnish financial statements.

Morgan's answers to the 1967 complaint are significant. He did *not* invoke the privilege against self-incrimination as a purported defense to *specific performance*. He merely denied that he was required to furnish the financial statements, erroneously contending that specific performance had been denied in the parent case and that such denial was res judicata (App. B, p. A60).

The next paragraph of the 1967 complaint, paragraph 8, was in the nature of a judgment-creditor's bill and contained the standardized allegations customarily made in such a bill. Paragraph 8 averred that Morgan had concealed substantial assets and resorted to other devices for

the purpose of hindering, delaying, and defrauding USF&G of its rights as a judgment creditor.

Morgan's answers did invoke the privilege as to a part of paragraph 8 of the complaint. In this connection, Morgan principally relied on two Mississippi statutes making it a misdemeanor to remove or conceal property subject to a mortgage or lien, including a judgment lien.[6]

A preliminary hearing was held to determine the claim of privilege that had been asserted in regard to a part of paragraph 8.

The Chancery Court ruled that Morgan was bound by contract to inform USF&G of the "nature, value, amounts, and whereabouts of his assets" and that he was *estopped* to refuse to make such disclosure. However, the Chancellor also ruled that at that time Morgan would not be required to file an answer to those particular averments of paragraph 8 that alleged concealment of assets and resort to other fraudulent devices.

Subsequently, the case was tried on the merits. Morgan could not be found for service of a subpoena and did not appear or testify. USF&G presented detailed evidence which strongly indicates that Morgan owns or controls several million dollars worth of liquid assets, consisting of cash, bearer bonds and negotiable securities—assets that are easy to conceal and difficult to find. The uncontradicted proof showed that, despite diligent efforts, USF&G had been unable to locate any substantial assets of Morgan.

On August 7, 1967, the Chancery Court entered a final decree in favor of USF&G.

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6. §§ 2250 and 2252, Mississippi Code of 1942, set forth *infra*, App. B, pp. A33, A34.

Paragraph 6 of the 1967 decree granted *specific performance* of Morgan's agreement to furnish financial statements, and directed Morgan to furnish USF&G with a financial statement in a standard form set out in the decree. This financial statement was *not* required to be under oath.

Paragraph 7 of the 1967 decree granted *discovery* and directed Morgan to furnish to USF&G a statement in writing setting forth the identity, status, location, and custody of his assets. That statement was to be under oath.

After the final decree had been entered, Morgan filed "Exceptions to Final Decree." Among other things, Morgan sought to invoke the privilege as to paragraphs 6 and 7 of the decree. As stated above, Morgan had not previously invoked the privilege as a defense to *specific performance* of his obligation to furnish financial statements. After hearing, the exceptions were overruled.

Pending appeal, Morgan obtained a stay of paragraphs 6 and 7.

In 1969, without dissent, the Mississippi Supreme Court affirmed the 1967 decree in all respects, holding that Morgan has waived and is estopped to invoke the privilege against self-incrimination as an excuse for refusing to disclose his assets. *E. E. Morgan* v. *USF&G*, 222 So.2d 820 (Miss. 1969), Appendix C hereto.

As noted by the District Court, the Mississippi Court recognized that the question of privilege was governed by federal standards and scrupulously applied those standards in making its determination (App. B, pp. A54, A38).

In regard to the right of *discovery*, the Mississippi Court said:

"If the constitutional privilege is applicable, we must also reach the question of whether it was *waived through estoppel.*" (App. C, p. A92, 222 So.2d at 828).

The Mississippi Court then held that Morgan has waived and is estopped to invoke the privilege as an excuse for refusing to make discovery of his assets (App. C, pp. A95-A101).

The Mississippi Court next dealt with the question of *specific performance* of Morgan's contractual obligation to furnish financial statements. On this question, the Court expressly held that the right to specific performance of this obligation had been adjudicated in favor of USF&G in the parent case and that Morgan was obligated to furnish USF&G the financial statement required by paragraph 6 of the 1967 decree (App. C, pp. A101-A102).

Pending application for certiorari, the Mississippi Court granted a further stay of paragraphs 6 and 7.

This Court denied certiorari to review the 1969 decision of the Mississippi Court. *E. E. Morgan* v. *USF&G*, 396 U.S. 842 (1969).

In 1970, after certiorari had been denied, the Chancery Court adjudged Morgan in civil contempt for his continued refusal to comply with the 1967 decree. The civil contempt decree directed that Morgan be confined until he purged himself of civil contempt by complying with paragraphs 6 and 7 of the decree. The contempt decree also imposed a civil fine to be paid until Morgan purged himself of civil contempt. Morgan has never been confined and has not paid any fine. Morgan has remained at large pursuant to a $100 bond filed in the present habeas corpus case.

On the same day that the civil contempt decree was entered, Morgan filed the present habeas corpus proceeding collaterally attacking the civil contempt decree. The jurisdiction of the Federal District Court was invoked under 28 U.S.C. § 2241. Contemporaneously with the filing of his habeas corpus petition, Morgan also appealed the civil contempt decree to the Mississippi Supreme Court. Before that appeal was heard, the habeas corpus case was tried in the Federal District Court.

After a full hearing, including consideration of voluminous evidence, together with briefs and arguments of counsel, the District Court rendered a comprehensive opinion setting forth its Findings of Fact and Conclusions of Law and holding that Morgan's habeas corpus petition should be dismissed with prejudice (App. B, pp. A26-A78).

After disposing of certain preliminary questions, the District Court stated "It now devolves upon this Court to determine whether this constitutional privilege was waived through estoppel, as was held by the Mississippi Supreme Court." (App. B, p. A61).

The District Court then reviewed the facts, discussed numerous authorities, and expressly held that Morgan has waived *and* is estopped to invoke the privilege as a basis for refusing to disclose his assets to USF&G (App. B, pp. A61-A78).

The District Court further stated that *"to hold otherwise would be contrary to the established law; the equities of the situation, and would be unconscionable."* (App. B, p. A77).

Accordingly, the District Court held that Morgan is required to furnish both (1) the financial statement as directed by paragraph 6 of the 1967 decree, and (2) the written discovery statement concerning Morgan's assets

as directed by paragraph 7 of the 1967 decree (App. B, pp. A77-A78).

The District Court further stated:

> "In any event, if the Court is mistaken in this regard, *it is perfectly clear that the financial statement must be furnished, and that petitioner's refusal to furnish it herein justifies his adjudication of civil contempt.*" (App. B, p. A78).

Accordingly, in November 1970, the District Court entered its final order dismissing Morgan's habeas corpus petition.

Subsequently, on March 1, 1971, without dissent, the Mississippi Supreme Court affirmed the civil contempt decree in all respects. Appendix D hereto, *E. E. Morgan* v. *USF&G*, 245 So.2d 587 (Miss. 1971).[7]

In the meantime, Morgan had appealed the present habeas corpus case to the Fifth Circuit. On September 17, 1971, a majority of a panel of that Court (Circuit Judges Brown and Morgan) rendered an opinion reversing the judgment of the District Court. Circuit Judge Gewin dissented in part and concurred in part.

In essence, the majority held (1) that the privilege cannot be relinquished by a prior voluntary contract to furnish information, and (2) that Morgan had not relinquished the privilege by conduct giving rise to an equitable estoppel (App. A, pp. A10-A11, A21-A22).

In his separate opinion, Judge Gewin strongly urged that Morgan should be required to obey the State court

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7. Morgan's petition for certiorari to review that decision is now pending in this Court as No. 70-344, October Term, 1971. On November 17, 1971, Morgan filed a motion under Rule 60 to dismiss this petition.

decree in its present form, but he should be afforded immunity from the use of the required information or its fruits (App. A, pp. A22-A25).

Judge Gewin also maintained that in view of Morgan's "representations, promises, and assurances" that induced USF&G to act to its detriment, Morgan "should not be permitted to nullify the Chancellor's decree by suggesting an imaginary and elusive possibility of a criminal prosecution. . . ." (App. A, p. A24).

A timely petition for rehearing en banc was denied on November 15, 1971. Judge Gewin dissented from such denial (App. F, pp. A121-A122).

SUMMARY OF REASONS FOR GRANTING THE WRIT

A. This is a purely civil case involving the orderly enforcement of a prior judicial decree and the fair administration of civil justice. The Mississippi Supreme Court has twice held in this same case that Morgan is barred and precluded from asserting the privilege against self-incrimination as an excuse for refusing to disclose his assets to USF&G, as he had expressly and unconditionally bound himself to do. This Court has heretofore denied certiorari to review the 1969 decision of the Mississippi Supreme Court which decided the identical federal questions here presented. In the present habeas corpus case, after exercising its own independent judgment on the facts and the law, the District Court has agreed with the holding of the Mississippi Supreme Court.

The holding of the District Court is based upon all the facts of this case, including Morgan's antecedent representations and his express agreements that make invocation of the privilege inconsistent and unconscionable.

The holding of the District Court is clearly correct, is firmly supported by abundant authority, and accords with every principle of right, justice, and fairness. On the other hand, the decision of the Fifth Circuit creates a serious and unnecessary obstruction to the fair administration of civil justice and conflicts in principle with prior decisions of this Court.

B. The District Court has applied basic principles of estoppel and waiver announced in prior decisions of this Court. Estoppel and waiver have often been applied by this Court to bar inequitable assertion of constitutional rights in civil cases. Estoppel or waiver may result from a deliberate election, or from a voluntary course of conduct that is inconsistent with the assertion of the right and renders it unjust and inequitable to permit assertion of the constitutional right. *Shepard* v. *Barron*, 194 U.S. 553, 565, 568 (1904). Estoppel or waiver may operate to bar any constitutional right or privilege that is conferred for the personal benefit or protection of the person as to whom the estoppel or waiver is claimed. Since the privilege against self-incrimination is a purely personal privilege intended for the sole benefit of the individual, it is subject to estoppel and waiver.

Waivers may be either express or implied. Like estoppel, implied waivers are based upon objective criteria and considerations of fairness, justice, and consistency; such waivers do not depend upon the subjective intention of the privileged person. *Brown* v. *U. S.*, 356 U.S. 148 (1958), affirming *Brown* v. *U. S.*, 234 F.2d 140, 144, 145 (C.A. 6, 1956).

This Court has expressly held that rights under both the Fourth and Fifth Amendments may be waived by a prior voluntary contract to furnish information, and the principles of that decision are directly applicable here. *Zap* v. *U. S.*, 328 U.S. 624 (1946).

C. The central standard for the application of the privilege is whether the person claiming the privilege is confronted by substantial and real and not merely trifling or imaginary hazards of incrimination and prosecution. Morgan is not exposed to any substantial and real hazard of incrimination by merely making a written disclosure of his assets. At most, Morgan merely shows a remote and bare possible contingency that should not be suffered to obstruct the administration of civil justice.

D. The State court decree grants two separate forms of relief: (a) specific performance of Morgan's express contractual agreement to furnish financial statements; and (b) discovery. Even if it be assumed that Morgan is not required to make the discovery, it is perfectly clear that he has been validly directed to furnish the financial statement, and his refusal to do so justifies the adjudication of civil contempt. Morgan's specific agreement to furnish financial statements overrides any possible claim of privilege. Consequently, that part of the decree which grants specific performance is unquestionably valid. Even if a decree is invalid in part, failure to comply with the valid part justifies an adjudication of civil contempt. *Tinsley* v. *Anderson*, 171 U.S. 101, 107 (1897).

E. In any event, as urged by the dissenting member of the panel below, the Federal courts should permit enforcement of the State court decree by affording a judicially established "use immunity," and adjudicating that Morgan must furnish the information required by the State court decree, but he shall not be subject to any criminal proceeding based upon such disclosure or its fruits. *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 75 (1964); *Uniformed Sanitation Men Association, Inc.* v. *Commissioner*, 426 F.2d 619, 623-624, 626 (C.A. 2 1970).

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Seriously and Unnecessarily Impairs the State's Ability to Enforce Its Civil Judicial Decrees and Is in Direct Conflict with Two Decisions of the Mississippi Supreme Court on an Important Question of Federal Law.

This is a purely civil case involving the orderly enforcement of a prior judicial decree for specific performance and the fair administration of justice between civil litigants. The net effect of the Fifth Circuit decision is that, in a civil case, a person may not be held to have precluded himself from asserting the privilege by his own voluntary agreements or a course of conduct that is inconsistent with the assertion of the privilege and renders invocation of the privilege unjust and unconscionable.

With all deference, such a holding is wrong by both legal and moral standards. Such a holding seriously impairs the fair administration of civil justice and a State's ability to enforce its judicial decrees. The holding conflicts in principle with prior decisions of this Court, and it is in direct conflict with two adjudications of the Mississippi Supreme Court in this same controversy.

The fair adjudication of civil disputes between citizens ranks very high in the public policy of this Nation. Consequently, this Court has held that in *civil cases,* the privilege against self-incrimination is *not* absolute, and considerations of consistency, justice, and fairness prevail in determining the scope and limits of the privilege. Thus, in the landmark civil case of *Brown* v. *U. S.,* 356 U.S. 148 (1958), this Court applied a rule of *constructive* or *implied* waiver, and said:

"The *interests of the other party* and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the *balance of considerations* determining the *scope* and *limits* of the privilege against self-incrimination. . . ." (356 U.S. at 156).

Similarly, in the famous case of *Boyd* v. *U. S.*, 116 U.S. 616, 624 (1886), this Court stressed the importance of civil proceedings to enforce judgments and "effect the ends of justice." *Boyd* involved a proceeding by the Federal government to forfeit goods for nonpayment of import duty. In holding that a statute providing for the compulsory production of documents violated the 4th and 5th Amendments, this Court carefully distinguished that forfeiture proceeding from a civil proceeding to enforce a judgment, and said:

"*. . . nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those [4th and 5th] Amendments.*

* * *

"*. . . and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill of discovery; . . .*" (116 U.S. at 624).

A recent important decision of this Court clearly establishes that in cases having a legitimate *noncriminal* purpose that is directly related to a State's governmental interest, the 5th Amendment privilege is not to be given a liberal or unrestricted application, but must be weighed

and balanced against the public interest that the State is seeking to protect. *California* v. *Byers,* 29 L.Ed.2d 9, at 17, 18, 19, 29, 31, 35 (1971) (upholding the California statute requiring motorists to furnish information in regard to automobile accidents).

In *Byers,* the controlling opinions of Mr. Chief Justice Burger and Mr. Justice Harlan both emphasized that the State's purpose in seeking the required information was essentially *noncriminal* and that the State had a legitimate governmental interest in requiring the information to be furnished. 29 L.Ed.2d at 18, 19, 29, 35. In the present case, the State court decree is purely civil, it is certainly noncriminal in its purpose, and the State of Mississippi has a vitally important governmental interest in the enforcement of its judicial decrees. We submit, therefore, that the considerations that governed in *Byers* are highly relevant and should prevail here.

Finally, there can be no question that the decision of the Fifth Circuit is in direct conflict with the 1969 and 1971 decisions of the Mississippi Supreme Court in this same case. As previously shown, both of those decisions expressly held that Morgan has waived and is estopped to assert the privilege as an excuse for refusing to disclose his assets to USF&G.[8]

Petitioners recognize that the privilege may be available in civil cases. Petitioners firmly submit, however, that under the prior decisions of this Court, in civil cases, assertion of the privilege may be precluded by prior voluntary contract, by equitable estoppel, or by waiver im-

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8. It is well settled that a direct conflict between the decision of a court of appeals and that of the highest court of a State on a question of federal law fully warrants and justifies a grant of certiorari. *Stern & Gressman, Supreme Court Practice* (4th Ed. 1969), § 4.9, p. 163, and § 4.27, p. 192.

plied from conduct. Petitioners further submit that the District Court and the State Supreme Court have correctly held that Morgan is barred and precluded from invoking the privilege as an excuse for refusing to disclose his assets, as he had freely and unconditionally bound himself to do.

II.

The Decision of the Court of Appeals Conflicts in Principle with Prior Decisions of This Court and the Purpose and Policies of the Privilege Against Self-Incrimination. On the Other Hand, the Decision of the District Court Is Clearly Correct and Is Firmly Supported by the Prior Decisions of This Court.

A. The District Court Was Clearly Correct in Holding That Morgan Has Waived and Is Estopped to Assert the Privilege Because of His Voluntary Agreements and Course of Conduct.

In upholding the State court decree, the District Court applied the firmly established rule that in civil cases, constitutional rights may be waived or lost by estoppel. This holding accords with every principle of right, justice, and fairness, and is firmly supported by the decisions of this Court.

It makes no difference whether the applicable principle be called estoppel, implied waiver, or express or implied contract. All of these doctrines are used to denote the termination, preclusion, or loss of rights which a party might otherwise have had but for his own voluntary actions. *Shepard v. Barron*, 194 U.S. 553, 568 (1904). Petitioners submit, however, that the doctrines of equitable estoppel and implied waiver are particularly applicable here.

Equitable estoppel results from any conduct, express or implied, which reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law. Estoppel does not depend upon any subjective intention to relinquish a known right, but upon the objective impressions created by a party's action, and a prejudicial change of position by the other party. Furthermore, constructive or imputed knowledge and intent are amply sufficient to create estoppel. *Yoshida* v. *Liberty Mutual Ins. Co.*, 240 F.2d 824, 829-830 (C.A. 9, 1957); 3 *Pomeroy, Equity Jurisprudence*, § 808b (5th Ed. 1941); *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-234 (1959); *Dickerson* v. *Colgrove*, 100 U.S. 578, 580 (1880).

This Court has often applied the principles of estoppel to bar inequitable assertion of constitutional rights in civil cases. For example, in *Pierce Oil Corporation* v. *Phoenix Refining Co.*, 259 U.S. 125, 128, 129 (1922), involving an alleged denial of due process, this Court said:

> "There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived *or the right to claim it barred* as other rights may be, by deliberate election *or by conduct inconsistent with the assertion of such a right* [citing cases]." (259 U.S. at 128-129).

Both the District Court and the Mississippi Supreme Court have specifically relied on the principles announced in the leading case of *Shepard* v. *Barron*, 194 U.S. 553, 48 L.Ed. 1115 (1904). In *Shepard* v. *Barron*, this Court held that certain property owners had *waived* or were *estopped* to assert a denial of due process. The District Court quoted from *Shepard* as follows:

> "Provisions of a constitutional nature, intended for the protection of the property owner, may be

waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, *and where it would be unjust to others to permit it to be set up.* * * *

* * *

"*. . . A defense of this nature and upon these facts need not be placed entirely upon the strict and technical principles of an estoppel.* While it partakes very strongly of that character, it also assumes the nature of a contract, implied from the facts * * *. *It does not in the least matter what we may call the defense, whether it be estoppel or implied contract, or one partaking of the nature of both.* 194 U.S. at 565 and 568, 24 S.Ct. at 741 and 742, 48 L.Ed. 1119-1121." (App. B, pp. A65-A66) (Emphasis added).

The vital principles of estoppel are not limited to constitutional provisions protecting property rights, but apply to any constitutional right or privilege that is intended for the personal benefit or protection of the person as to whom the waiver or estoppel is claimed.[9]

It is well settled that the privilege against self-incrimination is purely a *personal privilege* given to the individual *solely for his own personal benefit. Rogers* v. *U. S.*, 340 U.S. 367, 371 (1951); *Campbell Painting Corp.* v. *Reid*, 392 U.S. 286, 288 (1968).

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9. The cases are collected and the rule summarized in 16 C.J.S., *Constitutional Law*, § 89, p. 264, where it is stated:

"*. . .* the right to assert a constitutional right or to challenge the constitutionality of a statute may be lost by waiver or estoppel if the constitutional right or provision involved is one which was made for the benefit or protection of the person as to whom the waiver or estoppel is claimed. . . ." (p. 264).

Accordingly the District Court was correct in holding that in this civil case the privilege could be and had been barred by equitable estoppel (App. B, p. A77).

With regard to relinquishment of the privilege by contract, both the District Court and the Mississippi Supreme Court have applied the rule that the privilege may be waived by a prior voluntary contract to furnish information citing § 2275 of *Wigmore on Evidence* (McNaughton Rev. 1961), and *Zap* v. *United States*, 328 U.S. 624.[10]

In every edition of his treatise, Dean Wigmore states that the privilege may be waived by prior voluntary contract, and that *"This has been the doctrine since the origin of the privilege."* *Wigmore, Evidence* (3rd Ed. 1940), § 2275, p. 435; and (1st Ed. 1904-1905), § 2275, pp. 3150-3151.

In *Zap*, this Court expressly held that constitutional rights under the 4th *and* 5th Amendments may be waived by prior voluntary contract. In *Zap*, a contractor, in order to obtain business from the government, specifically agreed to permit inspection of his accounts and records. This Court held that *by making this agreement*, the contractor voluntarily waived any constitutional claim to privacy or immunity which he otherwise might have had with respect to business documents related to the contract.

The agreement in Zap did not use the word "waive", it contained no reference whatsoever to either the 4th or

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10. Rehearing denied 329 U.S. 824, vacated on other grounds 330 U.S. 800. The "other ground" on which the decision was vacated was the absence of women on the grand jury which returned the indictment.

As hereinafter discussed (pp. 29-34), the rule announced in § 2275 of *Wigmore* and *Zap* v. *U. S.* is firmly supported by history, policy, and precedent, and the Fifth Circuit's attempt to distinguish those authorities is not valid.

5th Amendments, and there was no showing of any subjective intention to relinquish or "waive" any "known" constitutional right. Nevertheless, this Court expressly found a "waiver" because of Zap's voluntary contract. This Court stated:

> "... And petitioner's contract with the Navy Department provided: 'The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government.' (328 U.S. at 627).
>
> * * *
>
> "As we have pointed out in Davis v. United States, No. 404, decided this day, *the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived.* And when petitioner, in order to obtain the government's business *specifically agreed to permit inspection of his accounts and records, he voluntarily waived* such claim to privacy which he otherwise might have had as respects business documents related to those contracts. ... (328 U.S. at 628).
>
> * * *
>
> *"... The waiver of such rights to privacy and to immunity as petitioner had respecting this business undertaking for the Government made admissible in evidence all the incriminating facts."* (328 U.S. at 630).

To paraphrase *Zap*, we submit that when Morgan, in order to induce USF&G to become his surety, specifically agreed to furnish financial statements showing his assets and current financial position, he voluntarily waived any constitutional right to privacy or immunity which he other-

wise might have had *with respect to his assets and financial resources.*

Under the principles announced in *Zap*, Morgan is clearly precluded from asserting any constitutional privilege that is *inconsistent* with his prior contractual undertaking to disclose his assets to USF&G.

Similar reasoning was applied by Chief Justice Traynor of the California Supreme Court in holding that a privilege against disclosure may be waived by a prior contractual undertaking to furnish information upon request, *Crest Catering Co.* v. *Superior Court*, 62 Cal.2d 274, 398 P.2d 150 (1965), quoted in the opinion of the District Court (App. B, p. A71).

In *Crest* an employer had contracted to "furnish all necessary information" in regard to a welfare fund. The administrator of the fund sought disclosure of certain employment tax returns. By specific statute, these returns were privileged and immune from discovery. In holding that the privilege had been waived, the court said:

> "*Crest* contends that the foregoing provisions do not waive the privilege because there is no specific reference either to the code provisions creating the privilege or to the tax returns. *A waiver does not depend upon meeting such a brittle requirement.* . . . .
>
> "*A waiver may occur (1) by an intentional relinquishment or (2) as 'the result of an act which, according to its natural import, is so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.'* . . ." (398 P.2d at 152).

Equitable estoppel and waivers implied from conduct are based upon objective criteria and considerations of consistency, fairness, and justice.[11]

As expressly noted by the District Court (App. B, pp. A74-A76), in civil cases, the 5th Amendment privilege may be waived by implication despite the absence of any subjective intention to relinquish or abandon the privilege. *Brown* v. *U. S.*, 356 U.S. 148 (1958), affirming *Brown* v. *U. S.*, 234 F.2d 140, at 144-145 (C.A. 6, 1956).

In the present case, Morgan induced USF&G to become his surety by means of unconditional representations and voluntary agreements that his assets were bound and would remain available for the complete protection and indemnification of USF&G. He voluntarily and specifically agreed to disclose his assets and financial position upon request. USF&G has suffered huge losses as a result of its reliance on Morgan's representations and agreements. Certainly, every principle of right, justice, and fairness dic-

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11. In regard to privileges, implied waivers are based upon considerations of fairness and consistency; such waivers do *not* depend upon the subjective intention of the privileged person. *Wigmore, Evidence* (McNaughton Rev. 1961), § 2388 at p. 855, § 2327 at pp. 635-636, § 2340 at p. 672; *U. S.* v. *Woodall*, 438 F.2d 1317, 1324-1325 (C.A. 5, En Banc 1971). "A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation." *Wigmore*, § 2327, at p. 636 (attorney-client privilege).

Since implied waivers are based upon consistency and fairness, they are closely akin to equitable estoppel. *Yoshida* v. *Liberty Mutual Insurance Co.*, 240 F.2d 824, 829-830 (C.A. 9, 1957).

Equitable estoppel is a rule of fundamental justice which, in a proper case, prevails over all other rules, including substantive rights or privileges conferred by a statute or constitution. 28 Am.Jur.2d, *Estoppel and Waiver*, § 34, p. 639. Likewise, estoppel imposes a result *regardless of the subjective intent of the party estopped, and sometimes even in defiance of it.* 28 Am.Jur.2d, *Estoppel and Waiver*, § 30, pp. 633-634. Thus, in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 232 (1959), this Court stated that estoppel is based on the maxim that "no man may take advantage of his own wrong."

tates that Morgan is barred and precluded from refusing to disclose his assets.

We submit, therefore, that the District Court and the Mississippi Supreme Court have correctly applied the principles of estoppel and waiver announced in prior decisions of this Court.

B. The Fifth Circuit's Attempted Distinction of the Authorities Relied on by the District Court Is Not Valid.

In reversing the District Court, a majority of the panel below embraced the dissent in *U. S.* v. *Field*, 193 F.2d 92 (C.A. 2, 1951), and concluded that the privilege cannot be relinquished by prior voluntary contract (App. A, pp. A11-A17). In this connection, the opinion below states that Professor McNaughton's 1961 Revision of § 2275 of *Wigmore on Evidence* is based on the majority opinion in *Field* and that *Field* is in conflict with *Curcio* v. *U. S.*, 354 U.S. 118 (1957). With deference, this conclusion is not sound.

First, the basic principles set forth in § 2275 of Dean Wigmore's text long antedate and are in no way dependent upon *Field*. As previously stated, in the first and every other edition of his text, Dean Wigmore states that the privilege may be waived by prior voluntary contract and that this has been the doctrine since the origin of the privilege. *Wigmore, Evidence* (3d Ed. 1940), § 2275, p. 435; and (1st Ed. 1904-1905), § 2275, pp. 3150-3151.

Dean Wigmore's statement is firmly supported by precedent and by the history, purpose, and policies of the privilege. This Court's 1964 decision in *Murphy* v. *Waterfront Commission* makes it crystal clear that the privilege is derived from a rule of law established by the English courts, both law and equity, and that English precedents are highly pertinent in determining the proper construc-

tion and application of the privilege. 378 U.S. 52 at 69, note 11, and 57, 58, 59, 77 (1964).

From the very inception of the privilege, the English courts have consistently held that in *civil* cases, the privilege may be waived by a prior voluntary contract to furnish information. *East India Co.* v. *Atkins*, 92 Eng. Rep. 1105 (1720); *South Sea Co.* v. *Bumpstead*, 25 Eng. Rep. 279 (1728).

Accordingly, in *Green* v. *Weaver*, 57 Eng. Rep. 630, 639 (1827), the court said that it had been established by a long series of decisions that a man, "*by the effect of his own acts*," may exclude himself from the protection of the privilege; or "*to adopt the expression of a very great Judge, he may contract himself out of the protection afforded by the principle. . . .*" (57 Eng. Rep. at 639).

It is clear, therefore, that the rule announced by Dean Wigmore is in no way dependent upon *Field*.

Second, *Curcio* v. *U. S.*, 354 U.S. 118 (1957) does not conflict in any way with Dean Wigmore's statement of the rule.

Curcio bears no similarity to the present case. *Curcio* arose out of the refusal of a custodian of union records to testify at a grand jury investigation of racketeering. The case merely involved the scope of the implied obligation of a *custodian of records* that results from his *assumption of the duties of custodian* (354 U.S. at 123-125). *Curcio* did not even touch upon the effect of a voluntary *contract* to furnish information.

Curcio did not mention, discuss, or in any manner imply approval of the dissent in *Field*. *Curcio* did not in any manner repudiate, criticize, or even mention the rule set forth in § 2275 of Dean Wigmore's text.

Accordingly, petitioners firmly submit that *Curcio* does *not* conflict with the established rule that the privilege may be waived by a prior voluntary contract to furnish information.

The Fifth Circuit's attempted distinction of *Zap* v. *United States* is likewise invalid. The majority below attempts to distinguish *Zap* by asserting that it involved the 4th Amendment protection against search and seizure, and not the privilege against self-incrimination. Actually, however, the defendant Zap expressly invoked the 5th Amendment and relied heavily on *Boyd* v. *U. S.*, 116 U.S. 616 (1886), discussed *supra*, p. 20. Accordingly, as noted by the District Court, a recent text on constitutional law cites *Zap* as specifically holding that the privilege against self-incrimination may be waived by a prior voluntary contract. *Antieau, Constitutional Law*, (1969) § 2.34, p. 193 (App. B, p. A75).

In a further effort to distinguish *Zap*, the majority also argues that there is a "qualitative difference" between waiver of rights guaranteed by the 4th Amendment and waiver of rights guaranteed by the 5th Amendment. (App. A, p. A16). With deference, this argument is likewise unsound. Contrary to the majority's conclusion, the 4th Amendment rights to privacy and personal security are of *equal dignity* with the 5th Amendment privilege. *Harris* v. *U. S.*, 331 U.S. 145, 150 (1947). Since *Zap* plainly holds that such 4th Amendment rights may be waived by prior contract, *it necessarily follows that the 5th Amendment privilege may also be waived by prior contract.*

Finally, the majority argues that "waiver" is an "intentional relinquishment of a known right" and that this requirement was not met. Such a conclusion completely ignores the established rule that both the requisite "intent"

and the requisite "knowledge" may be *constructive* or *implied*, instead of actual, particularly where the waiver is *implied from voluntary acts and conduct.* 92 C.J.S., *Waiver*, pp. 1060-1061.

Furthermore, as previously stated, in Zap there was no showing of any subjective intention to "waive" any "known" constitutional rights. Nevertheless, this Court expressly found a "waiver" because of Zap's voluntary contract.

After concluding that the privilege had not been relinquished by Morgan's prior voluntary contract, the majority below reversed the District Court's finding of equitable estoppel (App. A, pp. A17-A21).

In this connection the majority correctly states that *Shepard* v. *Barron*, 194 U.S. 553 (1904), and *Ralston* v. *Cox*, 123 F.2d 196 (C.A. 5, 1941),[12] did not specifically involve estoppel to assert the privilege against self-incrimination. However, those decisions (and numerous others) most assuredly do hold that constitutional rights may be lost by estoppel, *if, as is the case here, the constitutional right involved is one that is intended for the personal benefit or protection of the person as to whom the estoppel is claimed.* 16 C.J.S., *Constitutional Law*, § 89, p. 264, quoted *supra* p. 24, note 9.

Then, after expressing "doubt" that equitable estoppel "can *ever* prevent a person from asserting the privilege," the majority concludes that, in any event, estoppel does not apply here because USF&G did not "rely" upon Morgan's promise to provide it with financial statements, but instead

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12. In *Ralston* v. *Cox*, quoted by the District Court (App. B, p. A70) the Fifth Circuit said: "If constitutional rights may be waived, as is well settled, they are also subject to the legal principles of estoppel." (123 F.2d at 198).

relied *only* upon Morgan's antecedent oral promise to indemnify and the assets that stood behind this promise (App. A, p. A20).

In attempted support of this conclusion, the majority sets forth a *partial* excerpt from the 1966 decision of the Mississippi Supreme Court. The majority conclusion ignores the fact that this 1966 decision did *not* involve any question of estoppel or reliance, and the quoted excerpt merely discusses the question whether there was a valid *consideration* for Morgan's indemnity agreements in regard to the *negotiated* jobs. See 191 So.2d at 923, App. E at pp. A116-A117.[13] The quoted statement merely states that Morgan's antecedent oral promise "was *part* of the *consideration* upon which the bonds were executed." (Emphasis supplied).

With all deference, it is utterly specious to conclude that USF&G did not rely upon *all* of Morgan's numerous actions, promises, assurances, and written agreements, *the effect of which was a deliberate representation and assurance that Morgan's considerable financial resources were bound and would remain available for the complete exoneration of USF&G!*

Judge Gewin gets to the heart of this matter in the following statement from his dissent:

> "There is ample evidence in the record to support the conclusion that appellant *Morgan was the moving influence in all of the transactions under consideration.* Large sums of money are involved. *He made representations, promises and assurances in order to induce*

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13. On this same page, the Mississippi Supreme Court had already pointed out that the "competitive bid" jobs were actual *partnership* obligations of Morgan and Hyde and that there was no necessity for any additional "consideration." (App. E, pp. A116-A117).

others to act. He profited from the transactions under consideration and asserted that he was well able to indemnify and protect those *who were induced to act at his behest.* Thus having *induced, persuaded, promised* and *contracted* to repay sums of money which he caused others to lose, he should be required now to face the day of judgment. . . ." (App. A, p. A24).

III.

In Addition to the Fact That Morgan Is Barred and Precluded from Asserting the Privilege, Compliance with the Decree Does Not Present Any Real or Substantial Hazard of Incrimination.

In recent decisions this Court has emphasized that the central standard for the application of the privilege is whether the person claiming the privilege is confronted by *substantial* and *real* and not merely trifling or remote hazards of incrimination and prosecution. *Marchetti* v. *U. S.*, 390 U.S. 39, 53, 61 (1968); *U. S.* v. *Freed*, ... U.S. ....., 28 L.Ed.2d 356, 361 (1971); *California* v. *Byers*, ... U.S. ....., 29 L.Ed.2d 9, 17, 18, 19 (1971).

The only information that Morgan has been directed to furnish concerns the identity, status, location, and custody of his assets and property. Petitioners submit that Morgan is not exposed to any actual or real danger of incrimination by merely disclosing this information. It is apparent that Circuit Judge Gewin fully agrees with this contention (App. A, pp. A24-A25).

In the present civil litigation, USF&G is simply seeking to discover and locate assets that Morgan freely and voluntarily bound himself to disclose. Morgan is not appearing before any grand jury, and no prosecutor or criminal investigation is involved. The purpose of the present suit is not to compel Morgan to furnish incriminat-

ing evidence against himself in any criminal case, present or future.

In the setting of the present civil case, which was brought for the proper and legitimate purpose of enforcing a prior judicial decree, Morgan is not exposed to any *real* and *substantial* danger of incrimination by merely making a written disclosure of his assets as directed by the 1967 decree. *Kirtley* v. *Abrams*, 184 F.Supp. 65 (U.S.D.C. N.Y., 1960).

Judge Gewin emphatically states that Morgan should not be permitted to nullify the Chancellor's decree "by suggesting an *imaginary* and *elusive possibility* of a criminal prosecution . . ." (App. A, p. A24).

At most, Morgan merely shows a "remote and naked possibility" that should not be suffered to obstruct the administration of civil justice. *Brown* v. *Walker*, 161 U.S. 591, 599, 600 (1861).

IV.

Morgan Was Properly Adjudged in Civil Contempt for Refusal to Comply with That Part of the Decree Which Enforces Specific Performance of His Voluntary Agreement to Furnish Financial Statements, Even If It Be Held That He Is Not Bound to Comply with the Other Requirements of the Decree.

The majority opinion below fails to accord any significance whatsoever to the vitally important fact that the State court decree granted two separate and distinct forms of relief: (1) *specific performance* of Morgan's voluntary and express contractual agreement to furnish financial statements (not under oath), and (2) *discovery* under oath of Morgan's assets.

The District Court held that Morgan has been validly directed to furnish both (1) the financial statement required by paragraph 6 of the 1967 decree, and (2) the discovery required by paragraph 7 of the 1967 decree (App. B, pp. A77-A78).

The District Court further held that, even if it be assumed that Morgan is not required to furnish the discovery as directed by paragraph 7, *"it is perfectly clear that the financial statement must be furnished and [Morgan's] refusal to furnish it herein justifies his adjudication of civil contempt."* (App. B, p. A78, 321 F.Supp. at 591).

The District Court was clearly correct in so holding. Morgan's voluntary and express contract to furnish the financial statement must be held to override any possible claim of privilege *insofar as the financial statement is concerned.* The principles announced in *Zap* are decisive on this point and plainly established that Morgan is bound by his express contractual obligation.

Since Morgan has been validly directed to furnish the financial statement, he was properly adjudged in civil contempt for refusing to do so, even if it be held that he is not required to furnish the discovery.

The District Court's holding on this point is firmly supported by the established rule that, even if a decree which forms the basis of a contempt charge is void or erroneous in part, nevertheless, *if the decree is valid in part, failure to comply with the valid part justifies an adjudication of civil contempt.* See 17 C.J.S., *Contempt,* § 14, pp. 40-41, and *Tinsley* v. *Anderson,* 171 U.S. 101, 107 (1897), affirming dismissals of habeas corpus applications growing out of a State court civil contempt decree.

In view of the foregoing, petitioners respectfully submit that even if it be assumed or held that Morgan is not required to furnish the discovery, nevertheless, that part of the decree which enforces specific performance of Morgan's voluntary agreement to furnish financial statements is unquestionably valid and fully justifies the civil contempt decree. Consequently, Morgan is not entitled to habeas corpus relief.

V.

Under the 5th Amendment and the Supremacy Clause, the Federal Courts Should Permit Enforcement of the State Court Decree by Affording a Judicially Established Use Immunity in Regard to the Disclosures Required by the State Court Decree.

In the concluding part of its opinion (App. A, p. A22), the majority states that its decision "does not necessarily mean that Morgan cannot be required to provide the information" directed by the Chancellor's decree, since this information may be required regardless of the privilege "if there is immunity from federal and state use" of the information or its fruits.

However, after making this statement, the majority declined to establish such "use immunity" and stated that they would "leave the matter [of immunity] in the good hands of the courts of Mississippi." (App. A, p. A22).

In making this holding the majority was undoubtedly influenced by the erroneous assumption that the Mississippi court possesses the power to grant immunity from the use of the information. Actually, however, the Mississippi Supreme Court has expressly held that it does *not* possess such power. *Hubbard* v. *McKey*, 193 So.2d 129, 131 (Miss. 1966).

In his dissent, Judge Gewin strongly urged that the *Federal* courts should permit enforcement of the Chan-

cellor's decree by affording a judicially established use immunity, and adjudicating that Morgan must furnish the information required by the decree, but he shall not be subject to any criminal proceeding based upon such disclosure or its fruits (App. A, pp. A22-A23).

Petitioners respectfully submit that the solution urged by Judge Gewin is thoroughly sound and should be followed, since it would permit orderly enforcement of the State court civil decree, while at the same time fully preserving Morgan's constitutional rights. With deference, it accomplishes absolutely nothing for the majority to "leave the matter in the good hands of the courts of Mississippi," since the effect of the majority opinion is to completely shackle the hands of the State courts.

On the other hand, the 5th Amendment and the Supremacy Clause clearly empower the *Federal* courts to permit enforcement of the State court decree as suggested by Judge Gewin.

Since this Court's decision in *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964), several courts have held that disclosures may be compelled regardless of the privilege, if there is "immunity from federal and state *use*" of the compelled disclosure or its fruits in connection with a criminal prosecution.

These cases hold that complete immunity from prosecution ("transactional immunity") is not required, but immunity from use ("use immunity") is sufficient. *Zicarelli* v. *New Jersey State Commission,* 55 N.J. 249, 261 A.2d 129, 137-140 (1970), prob. juris. noted 401 U.S. 933, 28 L.Ed.2d 213 (1971); *Uniformed Sanitation Men Association* v. *Commissioner,* 426 F.2d 619, 623-624 (C.A. 2, 1970), motion to advance denied, ... U.S. ....., 29 L.Ed.2d 693 (1971); *Kastigar* v. *United States,* 440 F.2d 954, 957 (C.A.

9, 1971), cert. granted May 17, 1971, ... U.S. ....., 39 Law Week 3511 (1971); and *California* v. *Byers*, 29 L.Ed.2d 9, 16 (1971), which refers to a "judicially-created use restriction on the disclosures."

It is clear that adequate "use immunity" may be afforded without the necessity of any statute. Under the Supremacy Clause and the 5th Amendment, the *Federal* courts have ample power to adjudicate that a person shall be entitled "use immunity." Thus, in *Murphy*, this Court stated:

> ". . . The Court, in an opinion joined by seven members, made the following significant statement: 'a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. *The Fifth Amendment takes care of that without a statute.*' . . ." (378 U.S. at 75).[14]

In the present case, the Federal Constitution and an appropriate adjudication by the Federal courts will afford fully adequate "use immunity" to Morgan. Consequently it is not necessary that there be any Mississippi statute conferring such immunity.

Petitioners submit, therefore, that the Federal courts should permit enforcement of the State court decree by adjudicating that Morgan must furnish the information required by that decree, but he shall not be subject to any criminal proceeding based upon the information disclosed or its fruits.

---

14. The Second Circuit has held that a statute is not an essential prerequisite to the existence of "use immunity." *Uniformed Sanitation Men Association* v. *Commissioner, supra*, 426 F.2d 619 at 626 (C.A. 2, 1970).

CONCLUSION

In two separate opinions, after careful and thorough consideration, the Mississippi Supreme Court has expressly held that Morgan has waived and is estopped to invoke the privilege as an excuse for refusing to disclose his assets to USF&G. Likewise, after a searching study of the case, the District Court has agreed with the Mississippi Supreme Court.

Regardless of all the strained arguments that might be advanced to the contrary, petitioners submit that it is fundamentally wrong by both legal and moral standards to permit Morgan to refuse to disclose his assets to USF&G.

The District Court concisely expressed this same thought. After holding that Morgan had waived and is estopped to invoke the privilege, the District Court stated: "To hold otherwise would be contrary to the established law, the equitities of the situation, and would be unconscionable." (App. B, p. A77).

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-731

FRED THOMAS, SHERIFF, D. C. YEARWOOD, DEPUTY SHERIFF, and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioners,

vs.

E. E. MORGAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-731

FRED THOMAS, SHERIFF, D. C. YEARWOOD, DEPUTY SHERIFF, and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioners,

vs.

E. E. MORGAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF OF RESPONDENT IN OPPOSITION

RESPONSE TO PETITIONER'S "QUESTIONS PRESENTED"

We disagree with Petitioner's statement of the questions presented. If this Court has any concern for the controversy between the parties, it is with three narrow issues. As stated by the Court of Appeals:

> "We are thus presented in this appeal with two narrow issues: first, whether the privilege against self-incrimination can be relinquished by contract prior to the development of circumstances which would

make its exercise appropriate; and, secondly, whether the privilege can be lost under the traditional doctrine of equitable estoppel under the facts presented here."

The Court of Appeals held that Morgan was entitled to assert the privilege and that the privilege had not been relinquished by contract or conduct. This holding fully vindicated all constitutional claims and these have become moot.*

The third question is: May a federal court grant to a state court litigant an immunity from state criminal prosecution where no such immunity is allowed under state law and where such an immunity cannot even be granted by the state court itself.

The third question, above stated, arises exclusively on a theory of federal supremacy unilaterally advanced by Judge Gewin as the basis for his dissent below. It was neither advanced by any party nor adopted by the Court and, with deference, is unsupported by reason or authority.

RESPONSE TO PETITIONER'S "SUMMARY OF REASONS FOR GRANTING THE WRIT"

Rule 19 reasons assigned are limited to the contention that the decision below "conflicts in principle with prior decisions of this Court." The remaining assignments merely reflect a continuing controversy of interest only to the parties and of no discoverable immediate public signifi-

*When the decision of the Supreme Court of Mississippi was the subject of a Petition for Writ of Certiorari filed in this Court (No. 70-344), Petitioner filed a response to a petition to stay enforcement of the State Court judgment and stated in part as follows:

"Second, it is obvious and apparent that if the Fifth Circuit reverses the denial of habeas corpus relief and directs the discharge of Morgan, the State Court civil contempt case will become moot, and there will be no necessity whatsoever for any stay of the State Court judgment."

cance. Cf. *Rice* v. *Sioux City Memorial Park Cemetery* (1955), 349 U.S. 70, 75 S.Ct. 614.

A conflict has been cited as existing between the decisions of the Supreme Court of Mississippi and the Court of Appeals for the Fifth Circuit. But the conflict is not related to state law. All questions presented to the Court of Appeals were federal questions and its decision on these questions controls this case. There is no cited conflict among federal courts of appeal on the same matter, and this applies equally to the question raised by Judge Gewin's dissenting opinion, as will be later demonstrated.

The single Rule 19 reason, above quoted, simply is non-existent. In fact, the decision of this Court in the case of *McCarthy* v. *Arndstein* (1924), 266 U.S. 34, 45 S.Ct. 16,* is directly in point, holding that the privilege is available even to a bankrupt on interrogation to discover his estate, not listed in his schedule of assets, where concealment of assets is a criminal offense.

The cases from this Court principally relied upon by Petitioner, namely *Shepard* v. *Barron* (1904), 194 U.S. 553, 24 S.Ct. 737, and *Zap* v. *United States* (1946), 328 U.S. 624, 66 S.Ct. 1277, were correctly distinguished by the Court of Appeals.

Petitioner's reliance on the famous case of *Boyd* v. *United States* (1886), 116 U.S. 616, 6 S.Ct. 524, is misplaced. Not only that, but Boyd is a clear case in support of the availability of the privilege in the very circumstances of the present case and the fragmented quotation on page 20 of the petition is nothing short of a shocking misrepresenta-

*There was a series of *McCarthy* cases, cited as follows: *Arndstein* v. *McCarthy* (1920), 254 U.S. 71, 41 S.Ct. 26; *Arndstein* v. *McCarthy* (1920), 254 U.S. 379, 41 S.Ct. 136; *McCarthy* v. *Arndstein* (1923), 262 U.S. 355, 43 S.Ct. 562; and *McCarthy* v. *Arndstein* (1924), 266 U.S. 34, 45 S.Ct. 16.

tion of the Court's decision. Quoted in full context, with the *omissions* in Petitioner's quotation given in italics, the Court held:

> "*The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the fourth or fifth amendment, or any other clause of the constitution;* nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those amendments. *But, when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession, and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt;* and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery. *Whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property.*" (6 S.Ct. at 529, 116 U.S. at 624).

Also:

> *"Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom."* (6 S.Ct. at 533).

So it is in the case at bar. The U.S.F. & G., as judgment creditor, had and still has available to it every form of judicial process, such as writs of execution, garnishment, injunction and even receivership, all without constitutional objection. The judicial pursuit is restrained only when the Court attempts to extort discovery from the judgment debtor which could incriminate him. *McCarthy* v. *Arndstein*, supra.

All of the processual justice has been administered in favor of the U.S.F. & G.—execution, garnishment, mandatory injunction, prohibitory injunction and receivorship—which the Constitution of the United States allows. We simply have asked that Morgan be given the Fifth Amendment protection to which every individual in this nation is entitled. Thus restricted, the narrow question presented here is whether that protection is to be granted or is to be subordinated to Petitioner's sense of civil justice and to the state court's concern for the enforcement of civil money judgments. No court here-

tofore has subordinated the privilege on any such considerations and, we submit, there is no reason why the Fifth Circuit's vindication of constitutional claims should be disturbed.

RESPONSE TO PETITIONER'S "STATEMENT OF THE CASE"

Petitioner's statement is an admixture of facts, fictions and wishful conclusions. It presents nothing new. The same argumentative statement was made below, prefaced there with such statements as that this case is "peculiar and unique" on its facts.

The Court of Appeals, with the benefit of the full record and full detailed arguments, distilled the essential facts from the admixture and discarded that which was irrelevant or non-factual. We stand on the statement of the case as contained in the opinion below.

For the purposes of this response, we add only that Petitioner's continued emphasis on what it asserts to be the "peculiar and unique facts involved" serves at this point to imply that the case is one involving only the peculiar private interests of the parties before the Court. This is the antithesis of the announced requirement that the case deserving of certiorari review must transcend the purely private interest of the parties and involve a matter of immediate public significance. *Rice* v. *Sioux City Memorial Park Cemetery,* supra.

Therefore, the case either flows in the mainstream of routine commercial transactions or flows outside in a private channel, propelled by its peculiar and unique facts. If in a private channel, it has received all of the judicial attention that it deserves. If in the mainstream, a decision contrary to that rendered below would serve to rubber-stamp the great privilege out of existence in this

broad area of individual involvement. Cf. Judge Frank's opinion in *United States* v. *Field* (CA 2, 1951), 193 F.2d 92 at 107, quoted at pages 17-18 of the opinion below.

RESPONSE TO DETAILED "REASONS FOR GRANTING THE WRIT"

I.

Echoing the opinion of the state court, Petitioner argues that the decision below unduly impairs the state's ability to enforce civil judgments.

We respond that every process for enforcement remains available. It is only when the judgment creditor is called upon to incriminate himself out of his own mouth or by his own hand that the Constitution becomes involved. See *Boyd* v. *United States* (1886); 116 U.S. 616, 6 S.Ct. 524.*

No court has ever heretofore subordinated the privilege on the basis of a concern for its enforcement powers. The state court's subordination of Fifth Amendment rights out of concern for its collection powers runs head-on into the contrary holding of the Supreme Court of the United States in the *McCarthy* cases, supra, and to the numerous other decisions, both federal and state, which have upheld the privilege claim in civil debtor proceedings for collection and discovery, where concealment is made a criminal offense.

30 Am.Jur.2d, Executions, § 826, states:

> "A statute providing for the examination of the judgment debtor to determine whether he has any property subject to execution is unconstitutional if

*We have previously quoted from this famous case and have pointed out that the fragmented quotation included in the petition at page 20 is wholly misleading.

such examination is made compulsory and no provision is made for such immunity from prosecution as is requisite when self-incriminatory testimony is required. . . ."*

The cases cited to the above-quoted text arose in states which have statutes making it obligatory upon debtors to strictly discover their assets in post-judgment collection proceedings. Of necessity, these statutes write

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Horstman v. *Kaufman* (1881), 97 Pa. 147, 39 Am. Rep. 802, cited to the above text, involved the attempted statutory examination of the judgment debtor on oath as to his property. The Court held that the statute was unconstitutional under the self-incrimination clause of the State Constitution, since fraudulent concealment was a statutory misdemeanor.

Mitchell v. *Godsey* (1944), 222 Ind. 527, 53 N.E.2d 150, also cited to the text, involved a statutory post judgment creditor's action seeking discovery of assets. The Court upheld the act, but only because, despite its mandatory language, the defendant could not be "compelled to answer any question which would tend to incriminate him."

The Court cited its prior decision in *Overman* v. *State* (1924), 194 Ind. 483, 143 N.E. 604, which held that incriminating testimony could not be required "even though a statute purports to require the giving of such testimony."

Also, see: *Ex parte Clarke* (1894), 103 Cal. 352, 37 P. 230, holding that an insolvent debtor could not be compelled to make disclosures where concealment was criminal, absent a statute granting complete immunity from criminal prosecution; and *North* v. *Kirtley* (Mo., S.C. 1959), 327 S.W.2d 116, upholding the privilege in a proceeding under a post judgment discovery statute providing for the examination of judgment debtors.

By application of the same principles, the same result is reached in reference to pre-trial interrogations. See *Levine* v. *Bornstein* (1958), 174 N.Y.S.2d 574, and cases cited, including *Owen* v. *Fisher* (N.Y. 1947), 66 N.Y.S.2d 856, holding that the privilege is available to a party in a civil proceeding when claimed on a pre-trial discovery deposition. See also to the same effect: *Akers* v. *Fuller* (1950), 312 Ky. 502, 228 S.W.2d 29; *Kindt* v. *Murphy* (1950), 312 Ky. 395, 227 S.W.2d 895; *Muniford* v. *Croft* (Del., 1952), 93 A.2d 506; *American Cyanamid Co.* v. *Sharff* (CA 3, 1962), 309 F.2d 790. The Kentucky Court cited appropriately *Boyd* v. *United States* (1886), 116 U.S. 616, 6 S.Ct. 524.

Time and time again, the same principle has been applied in the Federal Courts in reference to civil discovery proceedings. There are no exceptions. In addition to *McCarthy* v. *Arndstein*, supra, and *Boyd* v. *United States*, supra, see *United States* v. *Saline Bank of Virginia* (1828), 1 Pet. 100, 7 L.Ed. 69; *Murphy* v. *Waterfront Commission of New York Harbor* (1964), 378 U.S. 52, 84 S.Ct. 1594; *Application of Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428.

themselves into every commercial contract. Yet, no waiver has ever been constructed out of either contract or conduct in those jurisdictions, and not once before has a court hesitated to honor the privilege out of any concern for its collection powers.

It is submitted that there is no threat to the powers of the judicial branch of the government, other than that required by the Fifth Amendment.

As to the claim that the application of the constitutional privilege may produce undesirable consequences as between the private litigants, this fact has never been regarded as a sufficient basis on which to deny the privilege when claimed in civil actions. *8 Wigmore on Evidence,* 3rd Ed., § 2257. *In re Nachman,* 114 Fed. 995,* held that:

> "The courts cannot deprive a citizen of the constitutional right invoked by him for his protection upon only consideration of inconvenience or for the purpose of administering what it may regard as a salutary and useful law."

In re Walsh, 104 Fed. 518,** pointed out that:

> "I can see that in some instances the fact that the bankrupt stands upon his constitutional guaranty would interfere with the proper administration of the bankruptcy law, but that is not a question which the court has the power to remedy."

See *Levine* v. *Bornstein* (1958), 174 N.Y.S.2d 574, and cases cited, including *Owen* v. *Fisher* (N.Y. 1947), 66 N.Y.S.2d 856, holding that the privilege is available to a party in a civil proceeding when claimed on a pre-trial discovery deposition:

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*This case was cited in the *McCarthy* cases, supra.

**This case was cited in the *McCarthy* cases, supra.

"The court is fully aware of the serious consequences that might be involved, but the court must accept the law as it is and cannot set aside a well established privilege granted and guaranteed to a citizen because the exercise of such privilege may result in undesirable consequences."

II.

Petitioner argues that the decision of the Court of Appeals conflicts with prior decisions of this Court on the waiver or estoppel point.

We respond that this Court has never held that the Fifth Amendment privilege could be bargained away by a stock phrase in the fine print of a commercial contract between private parties or that non-payment of one's debts by a guarantor in breach of contract could serve to subordinate the privilege by waiver or estoppel or on any other theory.

A guarantor who indemnifies a surety company is no different in principle from an endorser on a promissory note or from a debtor such as Arndstein whose privilege was sustained in bankruptcy proceedings. *McCarthy* v. *Arndstein* (1924), 262 U.S. 34, 45 S.Ct. 16, and related cases in the *McCarthy* series.*

We do not dispute the general principles of waiver and estoppel. These concepts simply do not fit this case and the Court of Appeals correctly so held. *Shepard* v. *Barron* (1904), 194 U.S. 553, 24 S.Ct. 737, *Zap* v. *United States* (1946), 328 U.S. 624, 66 S.Ct. 1277, and the *Wigmore* text were discussed and distinguished in the opinion of the Court of Appeals. We add the comments below:

*There was a series of *McCarthy* cases, cited as follows: *Arndstein* v. *McCarthy* (1920), 254 U.S. 71, 41 S.Ct. 26; *Arndstein* v. *McCarthy* (1920), 254 U.S. 379, 41 S.Ct. 136; *McCarthy* v. *Arndstein* (1923), 262 U.S. 355, 43 S.Ct. 562; and *McCarthy* v. *Arndstein* (1924), 266 U.S. 34, 45 S.Ct. 16.

Shepard v. *Barro.* (1904), 194 U.S. 553, 24 S.Ct. 737, much relied upon for the "waiver by conduct" theory, involved only the question of whether an individual could challenge the constitutional validity of a state tax assessment statute after having sought and accepted its benefits. The Fifth Amendment privilege against self-incrimination was not involved.

Zap v. *United States* (1946), 328 U.S. 625, 66 S.Ct. 1277, cited to the "waiver by contract" theory, involved a search and seizure of business records, and not a testimonial discovery from the individual involved. The case involved a contract with the Navy Department to be performed on a cost-plus basis. The government was defrauded by a false certification of a cost item and by utilization of a fictitious check posted on the contractor's books. The Court said:

> "Congress has provided for the inspection and audit of books and records of contractors such as petitioner . . . . And petitioner's contract with the Navy Department provided: 'The accounts and records of the contractor shall be open at all times to the Government . . . .'" (66 S.Ct. at 1278-1279).

The question was whether a search (audit inspection) of the books and seizure of the fictitious check without a warrant or with a defective warrant was lawful or so unreasonable as to violate the Fourth Amendment "as respects business documents related to those contracts." The Court dealt only with "the law of searches and seizures."

Zap emphatically did not hold that the contractor could be forced to furnish out of his own mouth or by his own hand a testimonial confession which could tend to incriminate for the crime charged. It held only that the search and seizure was not unreasonable and was therefore

lawful in view of (1) the federal statute, (2) the contract, and (3) the absence of force, fraud or trickery in obtaining access to the business records required by law to be kept open to inspection.

Zap should be read in conjunction with another decision rendered the same day and authored by the same Justice, namely *Davis* v. *United States* (1946), 328 U.S. 582, 66 S.Ct. 1256.

Both of these cases, *Davis* and *Zap*, involved the question of the admissibility of documentary evidence seized by federal officers in a search conducted without a warrant and involved only Fourth Amendment rights. Neither case involved the Fifth Amendment privilege against testimonial incrimination.

The Fourth Amendment prohibits "unreasonable" searches and seizures, from which it follows that any search and seizure found to be reasonable is not objectionable under that amendment.* On the other hand, the Fifth Amendment is absolute in its provision that no person "shall be compelled" to be a witness against himself. It is therefore not enough under the Fifth Amendment to avoid the privilege by the assumption that it would be more reasonable and consistent with the administration of justice to require incrimination than to afford the protection which the amendment makes absolute upon appropriate claim thereto.

The state court relied upon *8 Wigmore on Evidence*, § 2275 (McNaughton Rev. 1961). But instead of supporting a prospective waiver by private contract in relation to enforce testimonial disclosures, the text states clearly that:

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*Wyman v. *James* (Jan., 1971), 91 S.Ct. 381: "It is unreasonableness which is the Fourth Amendment's standard." (91 S.Ct. at 386).

"A bare contract to waive the privilege will not be enforced *specifically*. . . ."

Ignoring the above quoted statement, reliance was placed upon the next paragraph of the *Wigmore* text, which is quoted (with emphasis by the Court) as follows:

"Where there are not only the ingredients of an express or implied contract to waive privilege but also a *fiduciary relation* or other elements of public policy making recognition of privilege unconscionable, the waiver of privilege may be specifically enforced and the witness held in contempt for failure to make disclosures . . . ."

But the quoted *Wigmore* exception to the "bare contract" rule cites only one case involving a constitutional plea of the Fifth Amendment privilege.* This is *United States* v. *Field* (CA 2, 1951), 193 F.2d 92. This case dealt with bail bond sureties who were viewed as being fiduciaries in the *public trust.*

Antieau, Constitutional Law, § 2:34, referring to *United States* v. *Field*, states:

"A lower federal court has held that giving bail constituted a waiver of the privilege with respect to questions 'close and direct' to the fulfillment of the surety's duty to produce the suspect. *The result is not only unsupported by precedent, but seems an indefensible extension of the waiver doctrine.*" (Emphasis added).

*The two other cases cited did not involve a claim of the Fifth Amendment privilege. One was an opinion by a Delaware Chancellor in 1851, *State* v. *Maury*, 2 Del. Ch. 141, involving a bill to enjoin a lottery, wherein the public interest was noted along with the *rule in chancery* against requiring disclosures that could incriminate or cause forfeitures. The other is an 1827 English Court decision. *Green* v. *Weaver* (1827), 1 Sim. 404, 57 Eng. Rep. 630.

Wigmore, in footnote No. 5, states:

> "About the *Field* case, supra, Mr. Boudin had this to say: 'This conclusion—that the privilege may be waived by advance contract—was not advanced by the government and is not supported by any decisions in this country . . . . The court . . . adopted a new rule, waiver by contract, which appeared to be contrary to settled American law.' Boudin, The Constitutional Privilege in Operation, 12 Law. Guild Rev. 128, 139-40 (1952)." (8 *Wigmore on Evidence,* at 455).

The majority opinion in the *Field* case has now been rejected by the Supreme Court of the United States and twice contradicted by the same Second Circuit Court of Appeals in which two of the same judges participated.

See: *Curcio* v. *United States* (1957), 354 U.S. 118, 77 S.Ct. 1145, especially 77 S.Ct. at 1150-1151 and footnote No. 6.

Since the *Field* majority view has been rejected, Judge Frank's dissent in *Field* (193 F.2d 102-109), becomes tellingly prophetic for the case at bar, highlighting as it does many of the views later adopted in decisions of this court and the dire consequences which inevitably must follow from a ruling which would write the Fifth Amendment out of commercial transactions. As noted by Judge Frank:

> "Thus, if my colleagues' decision is generally accepted, the sole practical effect of the constitutional privilege will be to add a few words to a contract. So the high hopes of Madison and his fellows, expressed in this Fifth Amendment privilege, will end up in a rubber-stamp contractual clause. Especially will all government employees be stripped of the privilege—by

contract. Before long, rubber-stamped out of existence, the privilege will be but a quaint item of antiquarian lore." (193 F.2d at 107).

III.

Petitioner argues that Morgan only imagines that he may be in danger of criminal prosecution.

We respond that Morgan has been openly accused of fraudulently concealing assets to avoid a lien. He has been openly accused of failing to include all of his assets in a conveyance ordered by the state Court. This directly involves him first in the statutory crime of larceny which carries a one-year jail sentence and, secondly, in criminal contempt.

If these charges are groundless, then discovery avails nothing whatever. If true, Morgan is guilty of larceny and criminal contempt. He is asked by Petitioner to confess guilt by his own hand. There is nothing about this which the law characterizes as "imaginary" or "elusive". Neither the District Court nor the Court of Appeals nor the state court concluded that the danger was unreal or unsubstantial. The mere fact that U.S.F. & G. may be more interested in civil relief than in criminal charges is beside the mark. It has never been seriously questioned that the privilege can be invoked in civil proceedings.

IV.

Petitioner argues that even if Morgan cannot be compelled to make a formal discovery, he should be required to file with the court a financial statement.

We respond that the financial statement is a part and parcel of the discovery and cannot be separated

therefrom and is governed by the same rules. The Court of Appeals considered this argument and made no distinction:

In the concluding portion of the District Court's opinion a distinction was suggested as between Petitioner's obligation to furnish a financial statement and his obligation to give a testimonial discovery apart from such statement. However, we submit that the financial statement is a part and parcel of the discovery and cannot be separated therefrom, and is governed by the same constitutional considerations.

The financial statement had absolutely no value or use except as an instrument of discovery. The decree even selected two dates long past, and required the financial statements to disclose Morgan's "current financial position" on each date for comparative purposes. The two dates selected were September 3, 1965 and August 7, 1967.

The prohibition of the Fifth Amendment is directed against the judicial extortion of information from a party or witness after claim of the privilege is made. The privilege extends to private papers as well as oral or written testimony. *The discovery decree in this case would not only compel Morgan to produce his private papers, but would actually require him first to create the paper out of his own mind and by his own hand, in all respects as if he were directed to write out and file a confession of guilt despite claim of the Fifth Amendment privilege.*

Extortion of information from a party by one coercive judicial means, such as a mandatory injunction to file with the court a true financial statement, is just as effective and just as violative of the *Constitution* as is coercion by any other means. *Boyd* v. *United States,* supra,

stands in the way of any attempt to extort from the party by judicial process his private books and papers.

The financial statements have no intrinsic value and could not conceivably serve any purpose whatsoever other than a testimonial discovery under judicial mandate in an attempted negation of Petitioner's substantive rights* to remain silent when accused of criminal concealment.

In ordering discovery, the chancellor himself observed that "whether this be done by a statement by way of discovery or by a financial statement, I think it matters very little".

V.

Taking its cue from that part of Judge Gewin's opinion which constituted a dissent, Petitioner argues that the Supremacy Clause of the Constitution dictates that the federal court grant to Morgan an immunity from state prosecution for state crimes.

This theory was not advanced by Petitioner in its brief before the Court of Appeals, but emanated unilaterally from the pen of Judge Gewin. Now adopted by Petitioner, an effort to justify this novel concept is made by citing three cases, viz: *Murphy* v. *Waterfront Commission* (1964), 378 U.S. 52, 84 S.Ct. 1594; *Uniformed Sanitation Men Association* v. *Commissioner* (CA 2,

Malloy v. *Hogan* (1964), 378 U.S. 1, 84 S.Ct. 1489, repudiated the "concept of the privilege as a mere rule of evidence." (84 S.Ct. at 1494). *Miranda* v. *State of Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, cited *Malloy* to the point that "substantive standards" underlie the privilege. Cf. *United States* v. *Fernandez* (CA 5, 1970), 424 F.2d 1291, wherein the Fifth Circuit, citing *Murphy* v. *Waterfront Commission* (1964), 378 U.S. 52, 84 S.Ct. 1594, concluded: "Its exclusionary rule was also designed to give substantive effect to the privilege against self-incrimination." (424 F.2d at 1294).

1970), 426 F.2d 619, and *Kastigar* v. *United States* (CA 9, 1971), 440 F.2d 954.

These cases were not cited by Judge Gewin and understandably so, because they do not stand for the theory advanced. *Murphy* v. *Waterfront Commission*, supra, held that a witness may be compelled to testify by a state court where a state statute grants immunity although the testimony could incriminate the witness under federal law, but that when so compelled "the Federal Government must be prohibited from making any use of compelled testimony or its fruits."

The case certainly did not hold that a federal court might compel a witness to testify in a state court by granting to the witness a state immunity from prosecution for state crimes, where no state immunity was granted under state law.

Uniformed Sanitation Men Association v. *Commissioner of Sanitation*, supra, held that City of New York officials might grant to policemen a "use immunity" by requiring them to give information on penalty of discharge for refusal and could lawfully discharge the policeman for refusal to give the information.

This case held that compulsion engendered by the threat of discharge was enough to grant "use immunity" and that "use immunity", in turn, was enough to justify the policeman's discharge for refusal to answer. The Court did not hold that the policeman could be compelled to answer but held only that he could be discharged for refusal.*

*Cf. *Piccirillo* v. *New York* (1971), 91 S.Ct. 520; *In re Korman* (CA 7, 1971), 449 F.2d 32; *United States ex rel. Catena* v. *Elias* (CA 3, 1971), 449 F.2d 40.

In a footnote the Court said the same situation was not present in *Ellis* v. *United States* (D.C. Cir., 1969), 416 F.2d 791.

The *Ellis* case holds that a judge may not grant immunity from prosecution to a witness whose claim of privilege is recognized. The Court said:

> "The lack of judicial authority to grant immunity from prosecution to a witness whose claim of privilege is recognized also appears in opinions of this court. See Earl v. United States, 124 U.S.App.D.C. 77, 80, 361 F.2d 531, 534 (1966), cert. denied, 388 U.S. 921, 87 S.Ct. 2121, 18 L.Ed.2d 1370 (1967); In re Bart, 113 U.S.App. D.C. 54, 304 F.2d 631 (1962) (by implication)." (416 F.2d at 797, 798).

Kastigar v. *United States*, supra, held that a federal immunity statute is sufficient to compel answer before a grand jury if a "use immunity" is granted.*

It is well established that a judge or court may not grant to a witness an immunity from prosecution in exchange for his testimony which could expose him to criminal prosecution.

In *Isaacs* v. *United States* (CA 8, 1958), 256 F.2d 654, the Court said:

> "The court declared that it would grant immunity from prosecution if appellant would answer the interrogatories and it is argued that in these circumstances the appellant could not rely upon the Constitutional privilege of refusing to answer. The short answer to this contention is that the court was without authority to grant immunity from prosecution. The

*Cf. *Piccirillo* v. *New York* (1971), 91 S.Ct. 520; *In re Korman* (CA 7, 1971), 449 F.2d 32; *United States ex rel. Catena* v. *Elias* (CA 3, 1971), 449 F.2d 40.

attempt to grant such an immunity was not within the judicial power but was an attempted exercise of executive or legislative power. United States v. Ford, 99 U.S. 594, 25 L.Ed. 399; McCarthy v. Arndstein, 266 U.S. 34, 45 S.Ct. 16, 69 L.Ed. 158; Ullmann v. United States, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511." (256 F.2d at 661).

See also *Ellis* v. *United States*, supra.

Whether a witness who is compelled to testify on a judicial threat of contempt, may receive a "use immunity" by reason of the compulsion implied from the unlawful judicial threat is not the question involved here. Although historically a witness has been required to stand on his privilege claim or waive it, we need not debate the question because Morgan did not succumb to the threat in this case but stood fast on his privilege claim and has not testified. It has now been decided that he was justified in so doing and that he is not punishable for contempt for his refusal. We, therefore, are not involved with a situation where a judge erroneously orders a witness to testify and the witness, mistaking his right to remain silent in the face of a contempt threat, gives testimony which is later sought to be used against him in a criminal case.

Instead, the question is whether a federal habeas court judge may grant to a state court witness or litigant a state immunity from state prosecution for a state crime and thereby give license to an immunity which has not been granted by the state legislature and which could not be granted by the state court in which the testimony is demanded.

Petitioner correctly states in its petition:

"Actually, however, the Mississippi Supreme Court has expressly held that it does not possess such power

(to grant immunity) *Hubbard* v. *McKey*, 193 So.2d 129, 131 (Miss. 1966)". The cited case so holds. The Court said:

> "Without some sanction of the law, or some law authorizing the granting of immunity, the court had no authority to grant same and was correct in refusing to tell the witnesses that they would obtain immunity from prosecution by testifying. 58 Am.Jur. Witnesses § 85 at 73 (1948); 98 C.J.S. Witnesses § 439, at 259-260, 263 (1957)."

And this is in line with the authorities in general. See *Apodaca* v. *Viramontes, Sheriff* (1949), 53 N.M. 514, 212 P.2d 425, 13 A.L.R.2d 1427.

Petitioner makes no attempt to explain how a federal court under the Supremacy clause or otherwise can grant to a state court party an immunity from state prosecution which could not even be granted by the highest court of the state.

CONCLUSION

Viewed separately or collectively, the arguments advanced to deny the privilege amount to a broadly based threat to the application of the privilege in the very large area of commercial intercourse wherein its application has never before been doubted. The Court of Appeals correctly held that there was no waiver. The contrary assertion is unsupported either by reason or authority. In the final analysis, a contrary decision would amount to an abrogation of the Fifth Amendment privilege in the broad context of commercial transactions.

For a waiver to be effective, it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege. *Johnson* v. *Zerbst* (1938), 304 U.S. 458, 58 S.Ct. 1019. *Brookhart* v.

Janis (1966), 384 U.S. 1, 86 S.Ct. 1245. When the waiver of fundamental constitutional rights is claimed, the ordinary burden resting upon the party claiming waiver is increased by strong presumptions against the intentional relinquishment of such rights.

In *Brookhart* v. *Janis* (1966), 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314, the Court said:

> "There is a presumption against the waiver of constitutional rights, see, e.g., Glasser v. United States, 315 U.S. 60, 70-71, 62 S.Ct. 457, 464-465, 86 L.Ed. 680, and for a waiver to be effective it must be *clearly established* that there was 'an intentional relinquishment or abandonment of a known right or privilege'" (Emphasis ours) (86 S.Ct. at 1247).*

The liberality with which the privilege is viewed by federal standards was expanded in *Hoffman* v. *United States* (1951), 341 U.S. 479, 71 S.Ct. 814, wherein it was held that the privilege could be validly claimed where an answer to an interrogatory could possibly tend to incriminate or could possibly furnish a link in a chain of circumstances which might lead to criminal prosecution.

In the instant case, the complaint includes an express charge of fraudulent concealment for the purpose of defeating a judgment lien, the crime of larceny under the Mississippi statutes. (*Mississippi Code of 1942*, §§ 2250 and 2252).

In *Boyd* v. *United States* (1886), 116 U.S. 616, 6 S.Ct. 524, the Court said:

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*Also: *Johnson* v. *Zerbst* (1938), 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461; *Smith* v. *United States* (1949), 337 U.S. 137, 69 S.Ct. 1000; *Emspak* v. *United States* (1955), 349 U.S. 190, 75 S.Ct. 687; *Chapman* v. *State of California* (1967), 386 U.S. 18, 87 S.Ct. 824; *Curtis Publishing Co.* v. *Butts* (1967), 388 U.S. 130, 87 S.Ct. 1975.

"And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government . . . ." (6 S.Ct. at 533).

Specifically in debtor collection proceedings, the federal rule has evolved from bankruptcy cases: *Arndstein* v. *McCarthy* (1920), 254 U.S. 71, 41 S.Ct. 26; *Arndstein* v. *McCarthy* (1920), 254 U.S. 379, 41 S.Ct. 136; *McCarthy* v. *Arndstein* (1923), 262 U.S. 355, 43 S.Ct. 562; and *McCarthy* v. *Arndstein* (1924), 266 U.S. 34, 45 S.Ct. 16. These cases are directly in point. They stand both for the existence of the privilege in connection with collection proceedings and for the non-waiver of the privilege. They hold, in brief, that a bankrupt may claim the privilege when interrogated to discover his estate not listed in his schedule of assets where concealment of assets is a criminal offense.

There has never been the slightest departure from the *McCarthy* cases and numerous other cases have cited and reaffirmed the principles there announced, and these include such other landmark cases as *Hoffman* v. *United States* (1951), 341 U.S. 479, 71 S.Ct. 814 and *Malloy* v. *Hogan* (1964), 378 U.S. 1, 84 S.Ct. 1489, 1495.

Other recent cases have cited *McCarthy* and also *Boyd* to the point that the great privilege applies in all forms of proceedings and investigations and is to be liberally granted and is not to be watered down or eroded.*

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*Emspak v. *United States* (1955), 349 U.S. 190, 75 S.Ct. 687; *Blau* v. *United States* (1950), 340 U.S. 159, 71 S.Ct. 223; *Ullmann* v. *United States* (1955), 350 U.S. 422, 76 S.Ct. 497; *In re Grobian's Petition* (1957), 352 U.S. 330, 77 S.Ct. 510; *Brown* v. *United States* (1958), 356 U.S. 148, 78 S.Ct. 622; *Fay* v. *Noia* (1963), 372 U.S. 391, 83 S.Ct. 822; *Murphy* v. *Waterfront Commission of New York Harbor* (1964), 378 U.S. 52, 84 S.Ct. 1594, 1611; *Miranda* v. *Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602; *Application of Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428, 1454; and *United States* v. *Kordel* (1970), 90 S.Ct. 763.

As to the printed 1960 bond application relied upon, this is no different from the promise of any debtor to pay his debt and place his creditor in funds when the debt matures. To establish a precedent of waiver on the basis of this private contract document could only mean that in time the great privilege would be rubber-stamped out of existence by a few stock words in commercial contracts. Any distinction on the basis of an assumed creation of a "fiduciary relationship" would rule out the privilege in cases, for example, where the charge is one of embezzlement. This has never been the law, as to which see: *Ex parte Berman* (1930), 105 Cal. App. 371, 287 P. 125.

In 1964 it was decided in *Malloy* v. *Hogan* (1964), 378 U.S. 1, 84 S.Ct. 1489, that state courts were bound by the Fifth by force of the Fourteenth Amendment and by the standards enunciated by the federal courts for its application. In *Ullmann* v. *United States* (1956), 350 U.S. 422, 76 S.Ct. 497, the Court held that "This constitutional protection must not be interpreted in a hostile or niggardly spirit." (76 S.Ct. at 500).

In *Malloy* v. *Hogan*, supra, the Supreme Court held that the State could not use a "less stringent" standard or employ a "watered-down subjective version of the individual guarantees of the Bill of Rights."

We respectfully submit that certiorari should be denied and the Petition should be dismissed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-731

FRED THOMAS, SHERIFF, D. C. YEARWOOD, DEPUTY SHERIFF, and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioners,

vs.

E. E. MORGAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Pursuant to Rule 24, Petitioners submit the following reply to the arguments first raised in the Brief in Opposition:

I.

The Decision of the Fifth Circuit Conflicts in Principle with Prior Decisions of This Court and Is in Direct Conflict with Two Decisions of the Mississippi Supreme Court on an Important Question of Federal Law. Under Any View of This Case, It Presents Significant Questions of Public Importance That Should Be Decided by This Court.

Many of Respondent's arguments erroneously characterize the present case as one involving the purely "private interests" of the parties, and constitute an obvious effort to persuade this Court that the issues involved are not of national concern or of sufficient public importance to merit review by this Court. These arguments of Respondent are strikingly at variance with the arguments that Respondent himself advanced in his two prior petitions for certiorari in this same controversy (No. 491, October Term, 1969, and No. 70-344, October Term, 1971).

In both of those petitions, Respondent Morgan repeatedly and vigorously asserted that this case involves "federal questions of substance not heretofore determined by this Court"; that the question of waiver by prior voluntary contract is "especially critical to the public interest"; and that this case presents a question "in the broad national interest."*

For the reasons set forth in the present petition (pp. 19-40), and the reasons hereinafter briefly discussed, Petitioners earnestly submit that the present case involves questions of widespread public importance, that the substantiality of the questions presented is beyond doubt, and that the need for plenary review of the decision below is indisputable.

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*Petition in No. 491, October Term, 1969, pp. 4, 6; Petition in No. 70-344, October Term, 1971, pp. 3, 5.

The basic facts of this case clearly demonstrate that this case involves significant and far-reaching federal issues. These facts may be simply stated.

In order to induce USF&G to become his surety on performance and payment bonds for many millions of dollars, Respondent Morgan voluntarily represented and promised that his extensive assets were bound and would remain available for the complete protection and indemnification of USF&G. Morgan also expressly agreed to furnish financial statements to USF&G upon request. USF&G, as surety, has suffered millions of dollars in losses as a result of its reliance on Morgan's representations and voluntary contractual agreements.

Under these facts, the Mississippi Supreme Court has twice held that Morgan is bound to specifically perform his contractual obligations to USF&G, and that Morgan, by the effect of his own voluntary acts and contracts, is barred and precluded from invoking the privilege against self-incrimination as an excuse for refusing to disclose his assets to USF&G (Pet. pp. 2, 12-13, 15).

In so holding, the Mississippi Court has held that the privilege may be waived (and estoppel created) by a prior voluntary contract to furnish financial information, citing specifically *Zap* v. *United States*, 328 U.S. 624 (1946), and § 2275 of *Wigmore on Evidence* (Pet. App. C, pp. A95-A97).* The District Court has explicitly agreed with this holding (Pet. App. B, pp. A73-A75, A67-A68).

The Fifth Circuit, on the other hand, has held that the privilege may not be relinquished by a prior voluntary

*As shown in the Petition (pp. 29-30), the rule announced by Dean Wigmore is firmly supported by precedent and by the history, purpose, and policies of the privilege. Likewise, a recent text on constitutional law cites *Zap* v. *United States* as specifically holding that the privilege against self-incrimination may be waived by a prior voluntary contract (Pet. p. 31).

contract to furnish information, asserting that *Zap* v. *United States* does not so hold (Pet. App. A, pp. A15-A16), and that § 2275 of *Wigmore* does not correctly state the law (Pet. App. A, pp. A11-A15).

Thus, the conflict between the Mississippi Supreme Court and the Fifth Circuit is clearly defined. If, as held by the Mississippi Court, *Zap* holds that the Fifth Amendment privilege may be waived by a prior voluntary contract to furnish information, then the decision of the Mississippi Supreme Court is right, and the decision of the Fifth Circuit is not only wrong, but it also conflicts with a prior decision of this Court.

On the other hand, if, as held by the Fifth Circuit, *Zap* does not resolve the question whether the Fifth Amendment privilege may be waived by a prior voluntary contract, then the Fifth Circuit has decided a highly important question of federal law which has not been, but should be, settled by this Court. This is especially true since the decision of the Fifth Circuit is in direct conflict with two decisions of the Mississippi Supreme Court on this identical question of federal law.

Petitioners respectfully submit, therefore, that under any view of this case, review by certiorari is eminently appropriate.

If, as Petitioners contend, the decision of the Fifth Circuit conflicts with a prior decision of this Court, that is one of the strongest possible grounds for a grant of certiorari.

Even if it be assumed that the Fifth Circuit decision does not conflict with *Zap*, it is inescapably clear that the Fifth Circuit's decision is in direct conflict with two decisions of the Mississippi Supreme Court on a question of federal law that is of vital importance to the State of Mis-

sissippi and the public interest that it represents, as well as numerous other States and private litigants.

This conflict fully justifies a grant of certiorari. The applicable principle is firmly established by the decisions of this Court, and is summerized as follows in a leading text:

> "Another valid reason for the granting of certiorari by the Supreme Court is the presence of a direct conflict between the decision of a court of appeals and that of the highest court of a state, where that conflict concerns federal questions. Such a conflict will warrant review of either of the conflicting decisions, since the Supreme Court is the final arbiter of matters of federal law decided by either federal or state courts. Hence a conflict between such courts concerning the construction and application of the federal Constitution, or the validity, construction, or application of federal statutes or treaties, or any right, title, privilege, or immunity thereunder, will support a petition for a writ of certiorari." *Stern & Gressman, Supreme Court Practice* (4th Ed. 1969), § 4.9, p. 163.
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> "A conflict between decisions of a highest state court and a federal court of appeals on a question of federal law is ground for granting review of either decision." *Stern & Gressman, supra*, § 4.27, p. 192.

The Mississippi Supreme Court has stated in no uncertain language that the State of Mississippi has a vital governmental interest in the enforcement of its judicial decrees (Pet. App. B, p. A76). In actual, practical effect, the Fifth Circuit decision destroys the enforceability of

free and voluntary contracts and seriously impairs the fair administration of civil justice. Consequently, it is vital that the questions presented be decided by this Court.

II.

Under the Prior Decisions of This Court, the Federal Courts Should Permit Enforcement of the State Court Decree by Affording a Judicially Established Use Immunity in Regard to the Information Required by That Decree.

Another vitally important question is whether the Federal Courts should permit enforcement of the State court decree by adjudicating that Morgan must furnish the information required by that decree, but he shall not be subject to any criminal proceeding based upon the information disclosed or its fruits.

This question has two related aspects: (1) Whether "use immunity" (as distinguished from complete immunity from prosecution) is constitutionally sufficient, and (2) whether the Federal Courts are empowered to afford such use immunity by adjudicating that the State is prohibited from making any use of the compelled information and its fruits in connection with a criminal proceeding against Morgan.

These questions are brought into focus by two 1964 decisions of this Court that were decided on the same day. *Malloy* v. *Hogan*, 378 U.S. 1, and *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52.

In *Malloy* v. *Hogan*, this Court held for the first time that the Fifth Amendment privilege was made binding on the states by the Fourteenth Amendment.

Analysis of *Murphy* requires slightly more discussion. Prior to that case, this Court had held that the Fifth Amendment privilege did not protect a state witness against in-

crimination under federal law. Murphy was held in contempt by the New Jersey court for refusing to answer questions at a hearing. He had been granted immunity from prosecution by New Jersey, but still refused to answer on the ground that he might incriminate himself under federal law. On the basis of the prior decisions of this Court, the New Jersey court held that the contempt judgment was valid.

On appeal, this Court overruled its prior decisions to the contrary, and held that the privilege protects a state witness against incrimination under federal as well as state law. 378 U.S. at 77-78. However, this Court further held that New Jersey could compel Murphy to answer the questions propounded. This Court reached this result by affording a judicially established use immunity and adjudicating that the Federal Government would be prohibited from making any "use of the compelled testimony and its fruits" in connection with a criminal prosecution against Murphy. 378 U.S. at 79.

Petitioners submit, therefore, that *Murphy* clearly establishes that use immunity of the type afforded in *Murphy* fully satisfies all constitutional requirements.

Since this Court's decision in *Murphy*, several courts have held that complete immunity from prosecution is not required, but use immunity is sufficient. (Pet. pp. 38-39). Other courts have held that use immunity is not sufficient and that complete immunity from prosecution must be afforded. This precise question is now pending before this Court in several cases, and presumably will be resolved at this term. For a recent listing of pertinent cases, see *U. S. ex rel. Catena v. Elias*, 449 F.2d 40 at 48, notes 6 and 9 (dissenting opinion) (C.A. 3d, 1971), stay granted October 12, 1971, 92 S. Ct. 111 (1971).

Since the constitutional sufficiency of use immunity will soon be determined by this Court in other cases, we shall not argue that question at length. Petitioners do firmly submit, however, that use immunity affords protection that is co-extensive with the constitutional privilege, and is fully adequate to satisfy all constitutional requirements. As aptly stated by Mr. Justice White in *Murphy*, "Immunity must be as broad as, but not harmfully and wastefully broader than, the privilege against self-incrimination." (378 U.S. at 107, concurring opinion).

Accordingly, Petitioners respectfully urge this Court to hold that use immunity is constitutionally sufficient to require Morgan to comply with the State Court decree in the present case.

The next question is whether the Federal Courts may permit enforcement of the State Court decree in the present case by adjudicating that Morgan must comply with that decree, but that the State of Mississippi is prohibited from making any use of the required disclosure and its fruits in connection with a criminal proceeding against Morgan. We submit that there can be no real question that the Federal Courts have ample power to so adjudicate.

That is almost precisely the same solution that was adopted in *Murphy*. In *Murphy*, this Court held that when a state witness was called upon to make disclosures that might be incriminating under federal law, the Federal Court would permit the State to compel the disclosure, and would do so by affording a judicially established use immunity and adjudicating that the Federal Government was prohibited from making any use of the compelled testimony and its fruits in a criminal proceeding.

Clearly, the holding in *Murphy* was a judicial declaration and determination designed to accommodate the respective interests of the State and Federal Governments and resolve a problem that resulted from the requirements of the Federal Constitution.

The present case is a particularly appropriate one for the Federal Courts to adjudicate that Morgan must furnish the information required by the State Court decree, but the State shall be prohibited from making any use of the compelled information or its fruits.

As stated above, *Malloy* v. *Hogan* made the Fifth Amendment privilege binding upon the states. Thus it is the Federal Constitution, as construed by the Federal Courts, that entitles Morgan to use immunity. Since it is the Federal Constitution that imposes this requirement on the State courts, it is eminently fitting and proper that the Federal Courts should permit enforcement of the State Court decree by an adjudication that would afford use immunity to Morgan. This result can readily be accomplished by an adjudication of the type outlined above.

Contrary to Morgan's arguments, such a decree would not be an unauthorized exercise of executive or legislative power, but a typical and proper case of a Federal Court adjudicating the applicability, operation, and effect of a Federal constitutional provision.

None of the cases cited by Morgan militates against this solution.

Isaacs v. *United States*, 256 F.2d 654, 661 (C.A. 8, 1958), was decided several years prior to *Murphy* and did not even discuss the question whether a Federal Court could permit enforcement of a State Court decree by adjudicating that the witness should be entitled to use immunity. The case

merely involved the question whether the trial court could grant complete immunity from prosecution.

Likewise, the holding in part 2 of the opinion in *Ellis* v. *United States*, 416 F.2d 791, 796-798 (C.A. D.C., 1969), was based on the premise that a federal statute had confined the power to grant immunity from federal prosecution to a limited group of federal officials that did not include the trial judge. The Court said:

> "... We need not consider what would be the legal situation in the absence of such a statute." (416 F.2d at 796).

Morgan also refers to a footnote in *Uniformed Sanitation Men Association* v. *Commissioner*, 426 F.2d 619, 628 (C.A. 2, 1970). That footnote merely states that the Second Circuit had "no occasion to consider whether we agree with" part 2 of the opinion in *Ellis* v. *United States*, 416 F.2d 791, 796-798.

Petitioners submit, therefore, that Morgan has not cited any authority opposed to the solution urged by Judge Gewin in his dissent in the present case (Pet. App. A, pp. A22-A25).

In *Murphy*, this Court held that an adjudication prohibiting the Federal Government from the use of State compelled testimony or its fruits was amply sufficient to satisfy constitutional requirements. In the present case, in order to accommodate the interests of the State, while at the same time fully preserving Morgan's constitutional rights, the Federal Courts should permit enforcement of the State Court decree by a prohibitory adjudication similar to that made in *Murphy*.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for Certiorari, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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